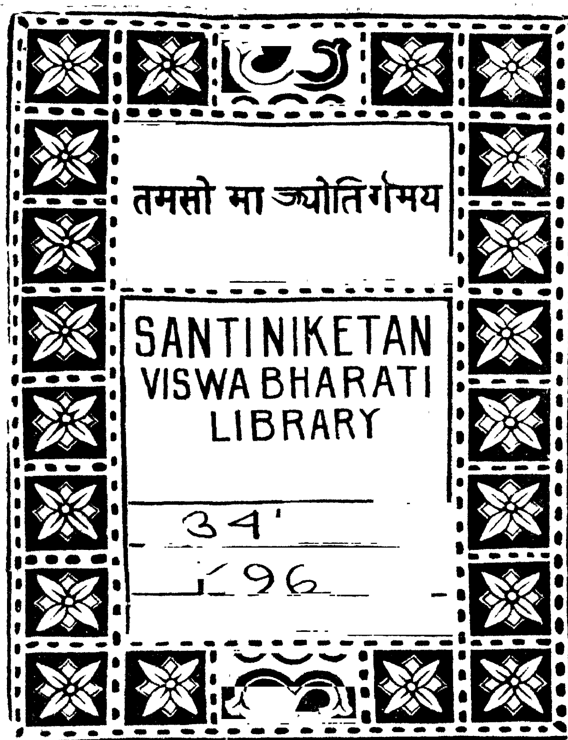


PUBLIC
INTERNATIONAL LAW

By

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THIRD EDITION

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PUBLIC
INTERNATIONAL LAW

To

The Memory

of

My Father

FOREWORD

By

The Hon'ble Mr. O. H. Mootham

Chief Justice, Uttar Pradesh

The purpose of this book, as the learned author says, is to explain "the rules of International Law with the object of mobilising public opinion in favour of the rule of law in the international sphere". The book is clearly written and the principles of law which should regulate the conduct of nations are lucidly stated. Mr. K. C. Saksena has done his part well; and the fact that a third edition of this book has been called for is not only evidence of the growing interest which the public is taking in international affairs but a tribute to the ability of the author.

I hope the present edition of this book will be widely read.

O. H. MOOTHAM

PREFACE TO THE THIRD EDITION

The previous edition of the book went out of stock by the end of the year, 1955. Had it not been for the publishers who insisted upon an enlarged version of the various topics of International Law, a new edition of the book would have followed soon after. I was hardly possible to ignore the wishes of the publishers but as, It was much too busy otherwise, this enlarged edition could not be brought out earlier.

The need for the maintenance of the rule of law in international sphere is more urgent today than it was at the close of the Second World War. The world today faced as it is with the terrible realities of the application of science to destruction and annihilation stands on the edge of a precipice. International distrust has brought about atomic—arms race and the whole world finds itself in a grip of fear. States, both big and small, while making high sounding declarations of their faith in the principles of peaceful co-existence have not been able to solve the problem of disarmament so far. They, no doubt, want peace but fear to adopt the recognised methods of solving problems of power politics. They are fully aware that the atomic bomb constitutes a sure means of destruction against which there can be no adequate military defence, but are powerless in disengaging themselves from a competition in nuclear weapons. The system of collective security envisaged by the Charter of the United Nations has now few votaries and military pacts have come into prominence. The United Nations Organszation established as an agency for promoting peace and good will among nations has ceased to inspire confidence in States and has failed to bring about an agreement between Washington and Moscow and to solve disputes involving the balance of power in the world. The tension between the communist and capitalist groups is so high that no problem of major conflict can be solved by the United Nations. The future of the United Nations depends upon the will of the great Powers to agree on major issues. The present cold war has to end if man is to survive in this world.

An anarchic world polity and disorder in international sphere call for mobilization of public opinion in favour of rule

of law. The maintenance of rule of law in international sphere is possible only when International Law is allowed to operate in international relations in the same manner as the municipal law operates in the affairs of individuals. The world community is to be held in check provided by the rules of International Law. The subjugation of States to rules of International Law is bound to result in the effacement of the concept of sovereignty and in the growth of world—social spirit which alone can banish war and establish everlasting peace in this world. An understanding of the rules of International Law is necessary not only for a lawyer but also for a layman, for it is the individual whose happiness is the ultimate concern of International Law. The present book simply aims at explaining the rules of International Law with the object of mobilizing public opinion in favour of the rule of law in international sphere. The author will feel amply rewarded if the book is proved to serve this purpose even in a small measure.

15, Kanpur Road
Allahabad

K. C. Saksena

PREFACE TO THE FIRST EDITION

The two Global Wars, occurring in rather quick succession in the present Century, have taught humanity the lesson that the happiness and prosperity of the individual depends in no small measure, on the maintenance of order in international society. In a world such as ours the maintenance of international law and order is as essential to the well-being of the individual as the maintenance of law and order within the State of which he is the subject. It is now widely realised that lawlessness within the community of nations vitally affects every human being and every effort must be made for the maintenance of international peace and security. Nations tired of the devastating wars abandoning the traditional doctrine of sovereignty and the so-called right of waging wars came together to form the United Nations with a firm determination to save succeeding generations from the scourge of war. They have not only pledged themselves to maintain international peace and security but 'to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights, and for fundamental freedoms for all without distinction as to race, sex language or religion'.

The much desired international peace and security depends upon observance of the rules of International Law which are based on principles of justice and equality. The purpose of the United Nations to achieve international co-operation for the promotion of common interests cannot be gained without the instrumentality of International Law. The well-being of mankind is secured by those principles of right and justice which form the basis of Public International Law and the realization of this fact explains why Public International Law is not only now the concern of students of law and professors at the universities but forms a favourite topic for the common man.

A clear idea of such a subject as the Public International Law is, therefore, necessary to all educated people who are interested in following the day-to-day international events which fill the columns of daily papers. This book is presented to give in brief yet clear terms the rules of International Law.

An author of a book which states the law, as it is and not what it ought to be, can hardly claim any originality and this book clearly yet briefly aims at stating the various rules of International Law as elucidated and stated by jurists of repute. The author has tried to collect the material for this book from sources such as the 'Codes of International Law' prepared by Oppenheim, Hyde, Wheaton, Hall and the works of Vattel, Kelsen, Fenwick, Pitt-Cobett, Alf-Ross, Schwarzenberger and Starke. To these and other great writers the author is greatly indebted.

This book is intended to serve the law students and all those who are interested in understanding current international problems. The author has taken every pains to present the rules of law correctly yet briefly so as to give a clear understanding of the subject to his readers. How far he has succeeded in this attempt is to be decided by those for whom this book is intended. The author is conscious of his shortcomings but he hopes that his kind readers will be indulgent.

K. C. Saksena

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PART I

INTRODUCTORY

INTERNATIONAL LAW

CHAPTER I

NATURE AND BASIS OF INTERNATIONAL LAW

Introduction.—Not only individuals but States require rules to govern their mutual relations. States, like individuals, cannot maintain intercourse with another State without agreeing upon certain rules of conduct by which they may advance their common interests and avoid conflict among themselves. Man has been described as a social being and a State which is an organised body of human beings cannot also exist in *isolation*. The modern means of communications and transportation by land, sea and air have led to the growth of international, social and commercial intercourse and establishment of close inter-State relations. The maintenance of order in the world community of States is rendered possible only by a legal order evolved out of the necessities of situations that have arisen in the course of mutual dealings between States. International Law supplies such a legal order and governs the relations between independent States. Its development is due to a realization on the part of the States that they are incapable of remaining isolated from each other and that their very existence depends on adherence to a law based on principles of justice and fair-dealing and established by general acceptance.

In spite of the two global wars that shook the very foundation of the society of nations and of the scepticism that prevailed about the nature of International Law, States feel themselves bound by a body of rules of conduct both in time of peace as well as of war. International Law is neither a body of rules by which 'professors and other bookworms vainly endeavour to limit the discretion of Generals and Admirals,' nor is it law 'only by courtesy' and is not a law which is 'vanishing point of jurisprudence.' It is a true branch of Jurisprudence and States under modern conditions are bound to follow it. "States have become increasingly aware of the

fact that a law governing inter-State relationships is irreconcilable with freedom to evade it......".[1] The fact that International Law is sometimes set at naught by powerful States affords no ground for the belief that there is in fact no International Law or that it is not binding on States. Oppenheim meets the argument thus :

"Violations of International Law are certainly frequent, especially during war. But offenders always try to prove that their acts do not constitute a violation, and that they have a right to act as they do according to the Law of Nations or at least that no rule of the Law of Nations is against their acts. The fact is that States, in breaking the Law of Nations, never deny its existence, but recognise its existence through the endeavour to interpret the Law of Nations as justifying their conduct. And although the frequency of the violations of International Law may strain its legal force to breaking point, the formal, though often cynical, affirmation of its binding nature is not without significance."[2]

The Name of the Science

The term, 'International Law' was invented by Benthem about 1780 and it got into vogue as embodying the rules regulating the conduct of nations in their intercourse with each other. In its early stages the law (wh ch we call International Law) was known as *jus gentium* in the Latin, *droit des gens* in the French and the 'Law of Nations' in the English language. The *jus gentium* of the Romans was not a body of rules which governed the mutual relations of nations but embodied those rules of natural law which applied to all mankind and which also formed part of the civil law of all nations. The jurists who maintained the view that rules governing the mutual relations of nations were based on natural law therefore adopted the term, *jus gentium* to denote the law which is now generally known as International Law. Hobbes and Pufendorf called this law as *jus gentium*; the latter styled his book on International Law as '*De jure Naturae et gentium*. Heffter was unwilling to use the term '*droit international* and adhered to the term '*jus gentium*'. The French term '*droit des gens*' was not found appropriate by some French writers who argued that there could be no *droit* (right)

1. Hyde—International Law, Vol. III p. 1681.
2. Oppenheim—International Law, Vol. I (Seventh Edition) p. 15.

where there was no *loi* (law) and there was no law where there was no superior. Dr. Zouche was the first to term it more accurately as *jus inter gentes* (the law between or among nations). Chancellor D'Aguesseau suggested the terms '*le droit des gens*' and '*le droit entre les gens*.' With the slow yet sure development of law, the term 'International Law' in the English language and '*droit international*' found general acceptance and came to be constantly used. Mr. Manning in his commentaries on the Law of Nations observed : "the phrase International Law is now in common currency, a definite and expressive term, of which Mr. Benthem claims the fatherhood, and which is almost the only term of his new political nomenclature that has passed into general circulation."

Benthem drew a distinction between Public and Private International Law. He used Public International Law for those rules which governed the mutual relations of States and which were known as the Law of Nations. The term 'Private International Law'he used for those rules which governed matters falling within the jurisdiction of more than one State. This distinction has been widely accepted and the term 'International law' when used without any prefix such as 'Public' or 'Private' is taken for the Law of Nations or the Public International Law. Oppenheim observes that it is necessary to emphasize that only the so-called Public International Law, which is identical with the Law of Nations, is International Law, whereas the so-called Private International Law is not, at any rate not as a rule."[1]

DEFINITIONS

The term 'Public International Law' denotes all these rules and regulations which modern civilized States follow and which they feel legally bound to follow in their mutual dealings.

This definition is in accord with the modern trend of juristic thought ; that International Law exists and is binding on the States, is not now open to doubt. The Charter creating the United Nations Organisation in 1945 recognises the existence and validity of International Law. It is International Law which the International Court of Justice is

1. Oppenheim's International Law Vol. I p. 6.

required to administer in deciding disputes submitted to it. The binding force of the rules of International Law is also evident from the practice of modern civilized States to which we shall refer later on.

International Law is composed of rules which regulate the inter-State relations and which are indispensable for the purpose of keeping the society of States in order. It is a system which regulates rights and duties of States *inter se*. The modern conception of a State which must of necessity deal with other States embraces in itself the idea of International Law to regulate inter-State relations. International Law is a concomitant of modern statehood and no modern State if it has to keep steady and frequent intercourse with other States can ignore the rules of International Law.

Some of the well known definitions of Public International Law are :—

Kelsen.—"International Law or the Law of Nations is the name of a body of rules which—according to the usual definition—regulate the conduct of the States in their intercourse with one another."[1]

Fenwick.—"International Law may be defined in broad terms as the body of general principles and specific rules which are binding upon the members of the international community in their mutual relations."[2]

Sir Cecil Hurst.—International Law "is the aggregate of the rules which determine the rights which one State is entitled to claim on behalf of itself or its nationals against another State."[3]

Starke.—"International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore do commonly observe in their relations with each other, and which includes also :—

(*a*) the rules of law relating to the functioning of international institutions or organizations, their relations

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1. Hens Kelsen—Principles of International Law p. 3.
2. Fenwick—International Law p. 27.
3. Sir Cecil Hurst—Internatioanal Law (The Collected Papers) p. 8.

with each other, and their relations with States and individuals ; and

(*b*) certain rules of law relating to individuals so far as the rights or duties of such individuals are the concern of international community."[1]

Alf Ross.—"International Law is the body of legal rules binding upon States in their relations with one another."[2]

Oppenheim.—"Law of Nations or International Law (*Droit des gens, Volkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other."[3]

Hall.—"International Law consists in certain rules of conduct which modern civilized States regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."[4]

Hughes.—"What is International Law ? It is the body of principles and rules which civilized States consider as binding upon them in their mutual relations. It rests upon the consent of Sovereign States."[5]

Hyde.—"The term International Law may be fairly employed to designate the principles and rules of conduct declaratory thereof which States feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other."

Brierly.—"The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized States in their relations with one another."

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1. Starke—An Introduction to International Law p. 3.
2. Alf Ross—A Text Book of International Law p. 11.
3. Oppenheim—International Law Vol. I p. 4.
4. Hall—International Law, 8th Edition, p. 1.
5. American Bar Association Journal, XVI (1930), p. 153.

Schwarzenberger.—"International Law is the body of legal rules which apply between Sovereign States and such other entities as have been granted international personality."

Calvo.—"By the Law of Nations or International Law, should be understood the sum of the rules of conduct observed by the various nations in their relations with one another ; in other words, the sum of mutual obligations of States *i e.,* to say the duties which they must perform and the rights which they must defend with respect to one another."

Hantefeuille.—"International Law (*droit international*) is that law which regulates and governs the relations of nations with one another."

Lawrence.—"International law embodies the rules which determine the conduct of the general body of civilized States in their mutual dealings".

Prof. James Lorimer.—"The Law of Nations is the law of nature, realized in the relations of separate political communities."

Holland.—defines the Law of Nations "as the public opinion of the Governments of the civilized world, with reference to the rights which any State would be justified in vindicating for itself by a resort to arms."

Gray.—According to Gray rules governing relations of nations between themselves constitute what is called the Law of Nations or International law.

Wheaton.—"International Law, as understood among civilized nations may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations ; with such definitions and modifications as may be established by general consent."[1]

Sir Henry Maine.—"The Law of Nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suited to the conduct of individuals in a state of natural equity, and to the relations and conduct of nations, of a collection of usages, customs, and opinions, the growth of civilization and commerce ; and a code of positive law."[2]

1. Wheaton.—Elements of International Law p. 14.
2. Sir Henry Maine —International Law (1883) p. 33.

West Rand Central Gold Mining Co. Ltd., *vs.* **The King case.**[1]—In this case International Law has been described as "the form of the rules accepted by civilized States as determining their conduct towards each other, and towards each other's subjects." It lays down that International Law rests on the common assent of civilized communities and that in order to prove a rule of International Law it must be shown that it either received the express sanction by international agreement or that it grew to be part of International Law by reason of the frequent practical recognition of States in their dealings with each other.

The 'Paquete Habana, and the 'Lola' case.[2]—This case recognizes that International Law is a body of living rules based on the common consent of civilized States. It laid down that "International Law is part of Law of the United States." This case emphasizes the importance of the works of jurists and commentators on International Law. It lays down that order to ascertain a rule of International Law resort must be had to customs and usages of the civilized States and to the works of jurists.

The Franconia case—R. *vs.* **Keyn**[3].—This case defines International Law as "that collection of usages which civilized States have agreed to observe in their dealings with one another." It lays down that the question as what these usages are must be determined on evidence adduced.

S. S. Lotus case[4].—The Permanent Court of International Justice in the Lotus case between France and Turkey defined International Law "as meaning the principles which are in force between all independent nations."

Conclusion.—These definitions, it may be observed, bring out the fact that International Law stands for those rules which civilized nations all the world over observe in their dealings with one another. The observance of the rules of International Law by independent States is necessitated by the circumstances of the modern world where States find themselves incapable of

1. (1905) 2 K. B. 391.
2. (1900) 175 U. S. 677.
3. (1876) 2 Ex. D. 63.
4. (1927) P. C. I. J. Series

remaining isolated from one another and where the international society cannot tolerate international disorder. These rules which the civilized States regard as binding upon them do not exist in theory but find expression in practice. The binding force of these rules is derived from the general consensus of opinion within the international society in favour of these rules. The Permanent Court of International Justice observed :

"This law is for the most part unwritten and lacks sanction; it rests on general consensus of opinion; on the acceptance by civilized States, members of the great community of nations, of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither committed to writing nor confirmed by conventions. This body of rules is called International Law.[1]"

The above definitions clearly show that the present day international society having witnessed the two global wars is prepared to abide by the rules of International Law to prevent the recurrence of international disorder. There is a general understanding that the common weal of the international society demands the submission of the various States of the world to a law, rule or custom which may govern their mutual relations. It has now been universally recognised that a State in order to live and let live must part with some of its sovereignty and must feel itself bound by some rules of conduct which have received approval of other States.

Starke describes the present day International Law thus :—

"International Law, as we know it today, is that indispensable body of rules regulating for the most part the relations between States without which it would be virtually impossible for them to have steady and frequent intercourse. It is in fact an expression of the necessity of their mutual relationships. In the absence of some system of International Law, the international society of States could not enjoy the benefits of trade and commerce, of exchange of ideas, and of normal routine communication."[2]

1. Judgment No. 9, Publications, Permanent Court of International Justice, series A. No. 10 per Judge Loder.

2. An Introduction to International Law by J. G. Starke (third edition) p. 14.

JURISTIC NATURE OF INTERNATIONAL LAW

The question whether rules of conduct prevailing between States constitute law in its true sense as old as the International Law itself and from the earliest stages of International Law jurists and lawyers have expressed their view on this question. Some of these views may however be noted as they furnish a clue to the solution of the problem.

Austin.—Law, according to Austin, was the command of a political superior and it applied to rules of conduct enacted by a determinate legislative authority and enforced by physical sanctions. As there is no political superior in the international sphere Austin regarded the law (now known as International Law) as rules of positive morality. Austin's opinion of International Law was coloured by his theory of law in general. He argued that all law emanated from a sovereign authority which was politically superior and as the rules of international character did not issue from a political superior authority, they could not be called law. To him International Law was nothing more than positive international morality. He defined International Law as consisting of opinions or sentiments current among Nations generally.

Savigny.[1]—International Law, according to Savigny was no doubt a positive law but an imperfect positive law. He called it imperfect positive law on the ground that its precepts were indeterminate and that it lacked the political power of the State and a Judicial authority competent to enforce it. Savigny maintained that a law governing mutual relations of nations was not unknown to antiquity and was known to Romans as *jus feciale*. He was of opinion that there existed a community of ideas among different nations and this community of ideas founded upon a common origin and religious faith constituted International Law as it existed among Christians—*States of Europe*, he observed : "The progress of civilization founded on Christianity, has gradually conducted us to observe a law analogous to this on our intercourse with all the nations of the globe, whatever may be their religious faith and without reciprocity on their part."

Kelsen.—International Law, according to Kelsen, is the name of a body of rules which regulates the conduct of States in their intercourse with one another. He is of the

view that the question whether International Law is law in the same sense as national or municipal law can be answered with reference to the definition of the concept of law. Law to him is a social order which aims at inducing men to refrain from certain acts which are detrimental to the interests of society and to perform other acts which are calculated to be beneficial to society. The inducement promised by the social order, is rendered effective by a threat of evil held out by an authority. Kelsen calls this threatened evil a sanction and enquires whether there is such a sanction in International Law. He is of the opinion that International Law is law in the same sense as national law provided it is, in principle, possible to regard employment of force directed by one State against another as a sanction or a delict, that is to say, a violation of the law. He then puts the question whether war, in International Law, is permitted as a sanction and whether war which is not permitted as a sanction constitutes a delict.

Hobbes.—As already stated Hobbes follows Austin in denying that there is any positive law of Nations. He considers municipal law and International Law as two parts of the law of Nature and that part which applies to States is called International Law. Hobbes' view of law followed his theory of sovereignty. According to him a sovereign was supreme and had a right over everything including religion. A sovereign was not bound by anything and therefore the rules of International Law could not curtail his powers which were supreme.

Pufendorf.—He did not agree with Hobbes in the view that a sovereign was supreme and was not bound by anything. According to Pufendorf sovereignty was supreme power in a State but it was capable of being curtailed. He was of the opinion that usages and comity of nations impose restrictions on the supreme power. But he was emphatic in declaring that there is no positive law of nations properly invested with a true and legal force and binding as the command of a political superior. He follows Hobbes in denying legal character to the rules of International Law and does not subscribe to the view that International Law is in true sense law.

Bynkershoek.—To him the rules of what is known as International Law are derived from reason and usage. He observed: "The ancient juris consults assert, that the law of nations is that which is observed in accordance with the light of reason, between nations, if not among all, at least

certainly among the greater part and those the most civilized. According to my opinion, we may safely follow this definition, which establishes two distinct bases of this law, namely, reason and custom." Bynkershoek having taken reason and custom to be the bases of International Law does not think that it has a binding force for he declares : "The law of nations is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party who is affected by it is expressed to the contrary."

Wolf.—Wolf introduces the fiction of a great Common-Wealth of nations provided by nature herself and proceeds to lay down that the nations in their common interests deduce certain rules of conduct from the natural law. These rules which are not in conflict with natural law, he thinks, constitute the common law of all nations or the voluntary law of nations. Wolf states that "the voluntary law of nations derives its force from the presumed consent of nations, the conventional from their express consent; and the consultudinary from their tacit consent." He considers the voluntary law of nations as a law which nature has imposed on all mankind and which every nation is bound to obey. According to him the customary law of nations is binding only on certain nations among which it has been established by long usage or tacit consent. Wolf declared that voluntary law of nations as the positive law or the necessary law of nations which nations were absolutely bound to obey.

Vattel.—To him the Law of Nations was nothing but simply law of nature applied to States or nations. Vattel called the law of nature as applied to regulate the relations among nations as the necessary law of nations and regarded it as absolutely binding upon all nations. According to Vattel the necessary law of nations consisted of precepts prescribed by the law of nature to States on whom it was as obligatory as on individuals. The necessary Law of Nations was distinguished from the three other kinds of positive law of nations namely the voluntary, the conventional and the customary laws of nations. He agreed with Wolf in his view that voluntary Law of Nations derived from presumed or tacit consent of nations was positive law. He also differentiated this law from the conventional law of Nations and customary law of Nations. He described conventional law as one resulting from compacts between particular States and customary law as resulting from usage between particular nations. These two laws, he thought, were not of universal application.

Heffter.—This German jurist declares that the Law of Nations or *jus gentium* is founded upon usage and tacit consent of nations. According to Heffter the Law of Nations does not merely regulate the mutual relations of States but also of individuals so far as concerns their respective rights and duties. Heffter rejects the term 'International Law' and considers that this term does not cover all that the term, *jus gentium* of the Roman jurists implied. In his opinion the Law of Nations belonged to all mankind and no people could refuse to acknowledge its operation and that all individuals and all States could claim its protection. Heffter is of the view that law is the necessary consequence of the existence of a society and that as there is a society of States there must be a Law of Nations binding upon States. He takes law as either having been imposed by a political superior or as that deriving its force from self-protection and places the Law of Nations in the latter category. He observes: "The motive which induces each particular nation to observe this law depends upon its *persuasion* that other nations will observe towards it the same law. The *jus gentium* is *founded* upon reciprocity of will. It has neither law-giver nor supreme judge, since independent States acknowledge no superior human authority. Its organ and regulator is public opinion : its supreme tribunal is history, which forms at once the rampart of justice and the *Nemesis* by whom injustice is avenged. Its sanction or the obligation of all men to respect it, results from the moral only of the universe, which will not suffer nations and individuals to be isolated from each other, but constantly tends to unite the whole family of mankind in one great harmonious society".

Wheaton.—The rules which regulate the reciprocal relations of States, according to Wheaton, are not derived from any Legislative or judicial authority but from principles of justice. Wheaton distinguishes International Law from the national or municipal law and observes : "While in every civil society or State there is always a legislative power which establishes, by express declaration, the civil law of that State, and a judicial power which interprets that law, and applies it to individual cases, in the great society of nations there is no legislative power and consequently there are no express laws, except those which result from the conventions, which States may make with another."

Oppenheim.—Oppenheim disagrees with the definition of law as formulated by Austin and defines law 'as body of rules for human conduct within a community

which by common consent of this community shall be enforced by external power. According to him there are three essential conditions of existence of law, *viz.*, a community, a body of rules for human conduct within that community and the common consent of this community that the rules shall be enforced by some external power. Having formulated this definition he goes on to find out whether rules of International Law fall within his definition of law. To him the term 'community' is not synonymous with 'State' but it is a conception which is wider than that of a State and refers not only to individuals but also to States. He maintains that there is an international community of the States of the world or at least a community of civilized States The first condition is thus satisfied. As regards existence of the rules of conduct there can hardly be any doubt. It cannot be denied that there are rules of conduct which States generally follow in their mutual relations. With respect to the third condition Oppenheim thinks that although there does not exist a Central Government above the Governments of the various States which could enforce the rules of International Law, the attitude of modern civilized States clearly shows that there is a common consent of the community of States that the rules of international character shall be enforced by external power. Oppenheim emphasizes that the practice of States is to recognise International Law as law pure and simple and that the public opinion of all civilized States is in favour of the view that the rules of International Law are legally binding on all the States. He agrees that on account of the fact, that there is no Central Government above the various States and there are no adequate means available for the enforcement of International Law, it is true that International law is weaker than municipal law. He further observes that this weakness of international law is greatly conspicuous in times of war but there is no reason to regard it as something other than law, for a weak law is still law. According to Oppenheim International Law is in true sense law.

Brierly. Brierly protests against the view that International Law ought to be classified as a branch of ethics rather than law and maintains that in fact it is practically inconvenient and also contrary to the best juristic thought to deny the legal character of International Law. He disagrees with jurists who adopt the views expressed by Hobbes and Austin and finds their definition of law misleading and in-adequate. He observes : "If, as Sir Frederick Pollock writes, and as probably most competent jurists would to-day agree, the only essential conditions for the existence of law are the existence of

a political community, and the recognition by its members of settled rules binding upon them in that capacity; International Law seems on the whole to satisfy these conditions." Brierly is of opinion that it is best to regard International Law as just a system of customary law and that some of the chief defects from which International Law suffers are those which are found in a customary system of law. He points out that the weakness of International Law does not lie in the absence of any system for enforcing it but in the lack of feeling on the part of the civilized States as to its imperative character. "It is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organised. The imperative character of law is felt so strongly within a highly civilized State that national Law has developed a machinery of enforcement which generally works smoothly, though never so smoothly as to make breaches impossible. If the imperative character of International Law were equally strongly felt, the institution of definite international sanctions would easily follow."[1] It is thus clear that Brierly is of the view that International Law is law in true sense and that the difference between it and the municipal law is one of degree and not of kind.

Pitt Cobbett.—Pitt Cobbett has no hesitation in expressing the view that International Law must rank with 'law' rather than with 'morality.' In his opinion the mere fact that there is no central authority in international system having power at once to compel resort to tribunals and to give effect to their judgments is no ground to regard International Law as less imperative and less explicit than municipal law, for it provides for some coercive force though not that particular coercive force as lies behind municipal or State law. According to him International Law as set in its early stages, is a law in the making and destined when full grown to become law in the full sense of that term. His view is that rules of international law are not optional in their nature but compulsive, notwithstanding the fact that they are often ill-defined and sometimes set at naught by powerful States.

Lawrence.—Lawrence regards International Law "as a science the chief business of which is to find out by observation the rules actually followed by States in their mutual intercourse, and to classify and arrange these rules by referring them to certain fundamental principles on which they are based." He follows the majority of writers in agreeing to call the rules governing the mutual relations of States as International Law

1. Brierly Law of Nations, p. 73.

and does not accept the definition of Austin. He observes: "They are enforced partly by a conscientious conviction that they are good and right, partly by those subtle influences which make it difficult for a man or a body of men to act in defiance of the strongly held views of those with whom they habitually associate, partly by a fear, lest disregard of them should in the long run bring evil on the *recalcitrant*."[1]

Theories.—In theory there is a controversy as to whether International Law is in true sense 'law' so as to be binding on the States. This controversy centres round the meaning to be assigned to the word 'Law.' Jurists headed by Austin who defined law as a command imposed and enforced by a political superior authority took the view that inasmuch as the rules of International Law did not emanate from a sovereign legislative authority and were incapable of being enforced by a political superior, they could not be regarded as rules of positive law but were simply rules of morality. This view which took 'law' in a very narrow sense denied any legal character to the rules of International Law. Prominent among those who supported this theory are Hobbes, Pufendorf and Benthem.

On the other hand, a larger number of jurists and writers on International Law finding fault with the definition of 'law' given by Austin asserted that the true test of law was the fact of its recognition as binding law and of its observance as such and held that International Law was in the true sense law. These jurists maintained that Austin's definition of law while true only with regard to the laws of modern times did not cover customary laws of primitive times when custom was in itself law enforced by the sanction of public opinion. According to this view which adopts a broader definition of 'law' and takes into account the historical legal developments, International Law is in true sense Law and is not 'positive morality.' The following are the main reasons advanced in favour of the theory that International Law is in proper sense 'law':—

(*a*) The term 'law' cannot be limited to rules of conduct enacted by a sovereign authority and enforced by physical sanction. The researches carried on by Sir Henry Maine and others on Historical Jurisprudence have established that in primitive communi-

1. Lawrence: The Principles of Municipal Law p. 8.

ties there were no formal sovereign authorities yet there were laws which were in force and were obeyed; and that long before enacted laws came into existence communities were ruled by custom and usages which enjoyed the full force of law and that there was no physical sanction save that provided by approval of the community. In view of these conclusions it is not possible to adopt the narrow definition of Austin and exclude International Law from the domain of 'law proper.' If the term 'law' is wide enough to apply to the laws of the primitive communities which had no sovereign authority to impose or enforce the laws, there can be no doubt that International Law is in true sense law.

(*b*) International Law at present, is composed more of the rules laid down by various law-making treaties and conventions and less of the old customary rules. Although the rules formulated by the law making treaties and conventions cannot be regarded as having been imposed by political superior, they have a sanctity behind them and are obeyed by States in their common interests.

(*c*) Modern States do not doubt the legal character of International Law and do not regard the rules of International Law as simply rules of morality. "If International Law were only a kind of morality, the framers of State papers concerning policy would throw all their strength on moral argument. But as a matter of fact, this is not what they do. They appeal not to the general feeling of moral rightness, but to precedents, to treaties, and to opinion of specialists."[1]

(*d*) In international disputes, the States do not deny the existence of the binding International Law but they contend for an interpretation of that law in a manner justifying their conduct. This conduct on the part of the States is indicative of the fact that they feel legally and not merely morally bound by International Law.

1. Oxford Lectures by Pollock P. 18.

(*e*) A number of States by their own municipal laws have accepted the constitutional validity of International Law and have ordered their officials, their courts and their subjects to carry out the obligations imposed by the Law of Nations. In some of the States (*e. g.* U. S. A.) International Law is a part of their own laws.

(*f*) International conferences and conventions treat International Law as law in true sense. The Charter of 1945 which created the United Nations Organization recognises the legal character of International Law. The function of the Court of International Justice is 'to decide in accordance with International Law such disputes as are submitted to it.'

Conclusion.—The attitude of the modern International society towards rules of International Law clearly shows that the above controversy as to the legal character of international law is not at all substantial. In practice the States regard International Law as binding on them in their mutual relations. While it is true that rules of international law do not emanate from a determinate sovereign authority it cannot be denied that in practice it has a binding force equal to, if not better than, the rules of any national Law. The mere fact that States sometimes think that they are free to violate International Law can afford no ground for supposing that it is not law in the true sense and that it is merely a kind of morality. In contests between States at the present day no reference is made by either parties to rules of natural law or morality but to positive rules of International Law as evidenced by customs, international agreements or precedents. Sir Frederick Pollock refutes the arguments of those who deny that International Law is in true sense law by observing that "if International Law were only a kind of morality, the framers of state papers concerning foreign policy would throw all their strength on moral argument. But as a matter of fact, this is not what they do. They appeal not to the general feeling of moral writings, but to precedents, to treaties and to opinion of specialists. They assume the existence among statesmen and publicists of a series of legal as distinguished from moral obligations in the affairs of nations."[1]

1. Pollock—Oxford Lectures (1890) p. 18.

It is no doubt true that there is no Supreme legislative authority in international sphere and the rules of international law lack such a sanction as is found with regard to national law but it cannot be asserted that international law consists of rules of morality and that it is optional on the States to obey it. The needs of the international society are such that the states have no option but to obey these rules and it will be more correct to say that international law is law as generally understood and not merely morality. Maintaining that international law is law and not morality Pitt-Cobbett observes. "It is law in the making, and possibly destined when full grown to become law in the most complete sense of that term ; in the sense, that is, of rules of conduct explicitly stated, duly applied and adequately enforced by some external authority. But apart from this and viewing the system as it now obtains, it would seem that on any rational view of law, whether reached by methods of history or the process of analysis, International Law must rank with "law" rather than with "morality."[1] The fact that the rules of international law are not always well defined or clear and that they are set at naught sometimes by States which are interested in creating international disorder cannot afford any justification for regarding them as mere rules of morality.

Defects of International Law. – Although it is not possible to deny either the existence of a body of rules which constitute international law or the binding force of such law on States, it cannot be asserted that international law is as perfect as any national law. The weakness that it suffers from has been universally recognised but it must be noted that such weakness is apparent only when a comparison is made with the national law. The practice of the modern States reflects international law in action and it dispels all doubts as to the reality of an international legal order. The purpose of all law is to keep order in society which it aims at governing ; international law fully serves this purpose for the States have realized that their existence and well-being depends upon their obedience to law and that it is not easy to break that law. Breaches of all kinds of law do often occur but they cannot furnish any reason for doubting the validity of law. International Law cannot, on the ground that sometimes States commit violations of law, lose its place as an international legal order.

1. Pitt Cobbett : Cases on International Law (Sixth Edition) Pp. 12—13.

Those who point out defects of international law do so when they compare it with the law within the States. If we adopt the definition of law given by Austin we cannot keep coming to the conclusion that international law is not law. Lord Coleridge observed : "Strictly speaking, International Law is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver, a tribunal capable of enforcing it and coercing its transgressors. But there is no common law-giver to sovereign states ; and no Tribunal has the power to bind them by decrees or coerce them if they transgress." It is true that international as compared with national law has defects. To the same effect Pitt Cobbett says : "As between States which are independent and legally equal there can be of course no common law-making body having power to bind them by its decrees, nor is there any Common Tribunal except the Permanent Court of International Justice having authority to interpret and apply law, between parties at variance to compel resort to the tribunal and give effect to their judgments. For these reasons International Law is not only less imperative and less explicit than State Law, but it also lacks the coercive force of State Law."

The defects generally pointed out refer to the absence of these organs which make laws and which enforce them. Brierly observes : "The two most serious shortcomings of the present system are the rudimentary character of the institutions which exist for the making and the application of the law, and the narrow restrictions on its range......But we may note here that there is no legislature to keep the law abreast of new needs in the international society : no executive power to enforce the law ; and although certain administrative bodies have been created, these, though important in themselves, are far from adequate for the mass of business which ought to be treated today as of international concern."[1]

As compared with law within a State International Law is weak and suffers from many defects, some of which are the following :—

(a) International Law as it stands today is uncertain and unsettled on many points.

(b) The rules of International Law being spread over innumerable treaties, conventions, resolutions of

1. Brierly : The Law of Nations p. 74.

Conferences and documents of Foreign Offices of the State are sometimes obscure.

(*c*) Existing international legislative machinery is not comparable in efficiency to State legislative machinery.

(*d*) The International Court of Justice established under the auspices of the United Nations Organisation does not possess universal compulsory jurisdiction, so as to settle all inter-State disputes.

(*e*) There is no central authority over the States to impose and enforce the law.

Legal Theories on basis of International Law.-After the foundations of a systematic international law had been laid by Grotius and the nations had become conscious of a body of rules which governed their foreign activities, juristic thought got busy in weaving out a legal theory adequate to explain and support international legal order. The need for such a theory was felt because of the absence of a central legislature, executive or judiciary in the international sphere. What imports binding force to the rules of international or why the States should be bound by these rules were some of the questions that confronted jurists of this period. Two main schools of thought, *i. e.* one of the naturalists and the other of the positivists having their own theories came into prominence and influenced the legal theory of those times. The adherents of each school were also not in agreement on every point and it will be noticed different theories of the same school struggled for supremacy.

The Naturalist School.--The concept of law of nature which had inspired the Greeks, the Stoics, the Romans, the Doctors of the Church and also Grotius could not fail to attract jurists after Grotius. The law of nature was regarded as the basic conception by the naturalists for evolution of theories. The adherents of this school of thought believed that natural law or law of nature was not only binding upon men but also upon states which were composed of men. They regarded natural law as consisting of rules of conduct prescribed by Him for rational creatures and revealed by the light of human reason. To them natural law consisted of those rules which formed the dictates of nature to human reason. The natural law was immanent, immutable and eternal and was binding

upon men simply because they were men. The naturalists asserted their faith in the fact that international law was simply natural law as applied to the relations of states with one another. Their view was that man-made laws must conform to natural law. They argued that international law was binding upon states in the same manner as natural law was binding on men. According to the naturalists international law derived its authority not from any agreement between states but from the very nature of human beings who composed the states.

Vattel who stands out as the most prominent naturalist calls law of nature which applies to nations necessary law of nations. He observes : "We call that the necessary law of nations which consists in the application of law of nature to nations. It is necessary because nations are absolutely bound to observe it. This law contains the precepts prescribed by the law of nature to States, on whom that law is not less obligatory than on individuals, since states are composed of men, their resolutions are taken by men, and the law of nature is binding on all men, under whatever relation they act."[1]

The classification of rights made by Vattel and his followers led to the formulation of a theory of Fundamental Rights which sought to explain the phenomena of international legal order.

Theory of Fundamental Rights. This natural law theory attempts to explain the validity of international law from the very nature of States. The exponents of this theory belong to naturalist school of thought and while accepting the view that international law is binding not only upon men but also upon States which are composed of men go a step further in asserting their faith in certain fundamental rights of States. They maintain that there are certain rights such as, right to self-preservation, independence, equality, respect and intercourse which are inherent in the nature of States and which none can touch. The existence of these rights in Statehood gives rise to a jural relation among States leading to obedience to international law. The fundamental rights are regarded to have come down to states from nature based upon reason. This theory implies a corresponding duty on other states so that the rights of one State are met with the corresponding duties of the other States.

1. Joseph Chitty : Vattel's Law of Nations (1834) P. lviii.

This theory like other natural law conceptions has been criticized as being unreal and misleading. It puts the cart before the horse inasmuch as it spells out a legal system from certain rights which in natural sequence flow from law and do not precede law. It makes the assumption that States like individuals have rights apart from those which are provided for by law. Brierly is of opinion that this "doctrine is a denial of the possibility of development in international relations; when it asserts that such qualities as independence and equality are inherent in the very nature of States, it overlooks the fact that their attribution to States is merely a State in an historical process; we know that until modern times States were not regarded either as independent or equal and we have no right to assume that the process of development has stopped."[1]

The Consent Theory, and the Positivist School.—The positivists developed their theory on the materials provided by Richard Zouche (1590-1660). Zouche laid great emphasis on that branch of international law which was the outcome of custom. He however did not deny the existence of a natural law of Nations. The Positivists however denied the existence of a natural law of nations but agreed with him in the existence of a customary law as well as a law based on treaties. They believed in observations and asserted their faith in the positive nature of the rules of international law. They rejected the natural law theory and maintained that obedience to international law was due to the fact that the States have either expressly or impliedly consented to be bound by that law and the States were not bound by those rules to which they have not accorded their consent. The positivist theory of international law was accepted by a number of jurists of the eighteenth century. One of the important supporters of positivism was Cornelius Van Bynkershoek (1673-1743) whose main thesis was that the common consent of the nations gave validity to the rules of international law. The legal theory as to the basis of international law propounded by those positivists is known as the 'Consent theory.'

The consent theory as originally put forward by the positivists was refined later on by the followers of the positivist school of thought and received new names. It was termed as auto-limitation or self-limitation theory and the doctrine of *Pacta Sunt Servanda.* The main idea underlying these

1. **Brierly: The Law of Nations. P. 52.**

theories was that the binding force of international law is derived from express or implied consent of the States. The exponents of these theories taking a clue form Hegel the great German philosopher attribute a will to States and clothe that will with full sovereignty. According to them the will of the State is absolutely sovereign and it is the source of the validity of law. They argue that the rules of international law become as positive as the rules of municipal law when the will of the State expressly or impliedly consents to be bound by them. It is the will of the State whether expressed in the form of legislation in the case of municipal law or manifested by consent in the case of international law that commands obedience. The positivists maintain that validity of all laws, national or international depends on the all supreme will of the State. They therefore believe that international law is binding upon States not of its own force but the States have expressly or impliedly consented to be bound by it. Oppenheim took the view which is shared by other jurists that common consent of the States was the basis of International Law. These writers maintained that consent given implicitly by custom and expressly by treaty furnished the basis of International Law. States, they argued, were bound by the rules of International Law because they had given their express or tacit consent to be so bound.

(a) **Auto-limitation Theory.**—Jellinek agreeing with the main postulate of the positivist school of thought attempted to explain the basis of international law by his theory known as the self-limitation theory or the auto-limitation theory. The supreme State will by consenting to be bound by the customary and conventional rules of international law places limitations on its sovereignty. It is by reason of self-limitation of the State will through consent that the rules of international law derive binding force. The argument was that inasmuch as the State will was supreme, it could not be restricted by any external agency but by itself, when it consents. The fact that the States voluntarily restrict their supreme will when they consent to be bound by some rule of law is implicit in Jellinek's theory of auto-limitation. The theory, it will be noticed, is more concerned with the effect of consent on the State will than with the source of the binding force of international law.

The theory has been criticized by many writers. Brierly rejects it on the ground that the idea of the State as a personality with a life and a will of its own is false both analytically and historically and that a self-imposed limitation is no limitation at all. Friedmann observes that in the event of 'any complicity between State interest and individual right on the one hand and State sovereignty and international order on the other hand' the theory is "bound to come down on the side of State sovereignty, for in the absence of a superior norm and authority, the State can revoke its voluntary self-limitations internally by altering the constitutional functions of its organs, internationally by revoking its voluntary observation of rules of conduct."[1]

(*b*) **The doctrine of 'Pacta Sunt Servanda.**—This theory was formulated by Anzilotti to explain the validity of the rules of international law. The principle *pacta sunt servanda* was regarded by Anzilotti as an absolute postulate of international legal order. According to Anzilotti rules of international law are either customary rules or rules arising out of treaties or agreements among States. He maintained that States are bound to respect the agreements entered into by them and they are also bound to obey customary rules by reason of an implied pactum. This theory emphasizes the pact both express and implied and insists on obedience to such a pact. Kelsen observes: "According to this doctrine the basic norm of customary international law is identical with the basic norm of conventional international law; that is to say, the principle *pacta sunt servanda*, as a rule of natural law, serves as the basic norm of the whole legal system we call international law. The essential function of this theory is to maintain the principle that a State can be legally bound only by its own will, and hence by its consent to the norms regulating its behaviour. In this way the theory maintains the dogma of the sovereignty of the State."[2]

1. Friedmann : Legal Theory p. 388.
2. Kelsen : The Principles of International Law p. 316.

Criticism of the Consent Theory—

This 'consent theory' cannot be accepted for the following reasons :—

(a) The theory is "simply inadequate to explain the assumptions upon which Governments appear to have acted from the very beginning of International Law. Whatever the position taken by writers, Governments have always looked upon International Law as having an objective character, as being binding because it was "the law", not because States found it to their covenience to observe it."[1]

(b) The 'consent' theory envisages the possibilitiy of a State refusing to give its consent to be bound by the rules of International Law. But a modern State having dealings with other States will find it impossible to signify its refusal to be bound by the rules of International Law. In other words, there is no option for a modern State but to agree to be bound by the International Law. In such a case where the State by reason of being a State is forced to agree to be bound by the rules of International Law, the question of consent hardly arises.

The exponents of 'Consent theory' employed the fiction of 'implied consent' to account for the acceptance of the rules of customary International Law. This fiction is not supported by any fundamental rule of International Law and is insufficient to explain the binding force of International Law under modern conditions which do not allow any freedom of choice to the States.

(c) The argument advanced by the supporters of the 'consent' theory that recognition of a State by other States implies a consent on the part of the recognised State is altogether fallacious. "Now as you all know —and as the word itself implies – recognition is an admission by other states that a particular community fulfils the conditions and possesses the qualifications required of a State. The act of recognition is the act of the other States—not the act of the State to be

1. International Law by Fenwick (Third Edition) P. 31.

recognised."[1] It is not conceivable how consent on the part of the State to be recognised can be implied from an act not its own but of another.

(d) "It is never necessary in practice when invoking a particular rule of International Law against a particular State to show that that State has assented to it diplomatically. The test applied is whether the rule is one generally recognised by the society of State."[2]

(e) There are very great practical difficulties in the acceptance of the 'consent' theory. According to it, the obligatory nature of the International Law depends on the existence of consent. The factum of consent will be required to be proved in all International disputes. In the case of large number of States there is no record of any such consent and no proof is forthcoming. Moreover, there are bound to be a lot of procedural difficulties in the way of such proof.

True Basis —It is not consent but the exigencies of modern life which provide the binding force to International Law. No State these days can exist in isolation. It must for various reasons maintain constant relations with other States. Mutual relations of States are necessary to be regulated and herein comes the need of International Law. Sir Cecil Hurst rightly observed : "The result is that a state cannot escape from subjection to International Law, or to put it slightly differently International Law is the necessary concomitant of statehood. International Law is in fact binding on States because they are States. This is not perhaps a very surprising position to which to attain because it must be remembered that our modern conception of a State is itself the creation of International Law and it is by the canons of International Law that the rights and duties of a State are defined."

It cannot be doubted that the rules of International Law have immense binding force and that these rules have acquired such a great importance in our times that they require no juristic theory for support or enforcement. The modern practice of States under the supervision and the influence of the United Nations Organization is marked by an implicit faith in the rules of International Law which derive their force not from

1. International Law (collected papers) by Sir Cecil Hurst p. 11.
2. An introduction to International Law by J. G. Starke p. 23.
3. Sir Cecil Hurst ; International Law (Collected Papers) p 9

any legal theory but from the peculiar situation of the inter-dependence of States. According to Brierly the explanation about the binding force of law is furnished by the fact that states like the individuals are constrained to believe that their existence depends not on chaos but on order. The order in International sphere is provided by the rules of conduct the observance of which results in peace and tran-quaillity. It is recognised by International lawyers that common needs, and the mutual conveniences, of the States are responsible for the evolution of the rules of conduct in the international sphere. The co-existence of a number of States both great and small on earth together with constant intercourse among them calls for rules which may govern their mutual relations. The rules of law in any sphere, national or international are product of order which both individuals and nations aspire for. Lawrence stated : "Commerce, intermarriage, scientific discovery, community of religion, harmony in political ideas, mutual admiration as regards achievements in art and literature identity of interests or even passion and prejudices—all these and countless other causes tend to knit States together in a social bond analogous to the bond between man and his fellows. But just as men could not live together in a society without laws and customs to regulate their actions so States could not have mutual intercourse without rules to regulate their conduct. The body of such rules is called International Law".[1]

The fact that there are in existence rules of International Law and that States not only refer to them in their dealings with other States but also act in accordance with them is as apparent as the existence of a law within the States. The States obeying International Law do not pause to enquire into the reason which require them to obey it just as individuals acting in-accordance with the law of their State do not worry as to the basis of the law binding on them. The individuals in the national sphere and the states in the international sphere are in the habit of acting in conformity with certain rules of conduct. This habit in both the spheres can be said to have begun not only in an in-nate desire to be orderly and peaceful, but in the social dealings with each other. In this respect there is no difference between an individual and a State. A State is composed of individual human beings and the interests of a State are those of the individuals which it represents. Men cannot live without a society ; States also cannot exist in isolation. A State like an individual is to move in society for its various needs and

1. Lawrence ; the Principles of International Law p. 3

conveniences. The modern States with easy and quick means of communication and intercourse have come close together and have become absolutely dependent upon one another in matters of common interests. It is not possible for them to lose company and to deprive themselves of the benefit of help and co-operation in vital matters. The States like individuals have to adopt a course of conduct which may be conducive to friendly relations. The rules of International law in existence in ample manner provide for such a course of conduct. This explains the obedience of States to International Law. The hard facts of international life provide the cause of which binding force of International Law is the effect. A juristic explanation is not at all needed for this phenomena. Fenwick examining this aspect concludes thus : "The interdependence of states is a fact ; a community of interest between states exists in as real a sense as a community of interests between individual men. The need of law between state and state is as great, although less obviously so, as the need of law between man and man. The prevention of war, the regulation of conflicting claims, the promotion of the general welfare of the group are conditions which create a moral and material unity between individuals within the state. The fact that nations have these common interests constitutes an actual community of states, and at the same time imperatively demands a rule of law ; so that international law may be said to be based upon the very necessity for its existence upon the very human beings in constant contact with one another under the conditions of the present day. Beyond that all discussion of its philosophical basis is academic.[1]"

The validity and the binding force of International law is constantly exhibited by the international events happening around us. The fact of the existence of International Law with its binding force is now so well established that it has become a strong truism. It is therefore futile to try to find out a theory for the basis of International Law. Brierly observes ; "The International lawyer then is under no special obligation to explain why the law with which he is concerned should be binding upon its subjects". The true basis of International Law is furnished by the naked fact of complete interdependence of States.

Public International Law and Private International Law.—Public International Law is quite different from Private International Law. We have seen that Public International

1. Fenwick : International Law (Third Edition) p. 31-32.

Law regulates the conduct of States in their intercourse with each other It is one for all the States. On the other hand, Private International Law prescribes conditions under which a case having a foreign element is to be entertained by courts of a State and to determine as to which system of law is to govern the rights of the parties to that case. Every State has its own rules of Private International Law, the content of which is laid down by judicial tribunals and legislatures of each State. Unlike Public International Law, it deals with the acts of individuals and not of States. The rules of Private International Law recognize that in order to protect rights vested in a person the laws of a State must not disregard the foreign law by which rights have become vested in that person. "The basis of these rules is the "Comity of Nations" not the extraterritorial validity of the law of the foreign State ".[1] The United States Supreme Court in the case of *Hilton* vs. *Guyot* held that "comity was neither a matter of absolute obligation on the one hand, nor of mere courtesy and goodwill, upon the other", and that "it is the recognition which one nation allows within its territory to the legislature, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws".[2]

Future of International Law.—If the present tendencies in international sphere are indication of the future, the international legal system will reach its perfection at no distant time. The attitude of the States towards International Law at present is such as may lead to a hope that the main defects generally pointed out will disappear. A careful scrutiny of the international events which have happened after the second World War will reveal that their is a growing tendency on the parts of States to refer their difficulties to the United Nations and their organs to respect rule of law and to feel pursuaded by the recommendations of the United Nations and their organs. This tendency is expressive of their faith in the law and in the potency of the United Nations. The work so far done by the United Nations is a proud record of achievement in many a field of activities. In the political field the United Nations succeeded in solving some knotty problems. It was called upon to exert its influence in many a political crises such as the Balkans, Iran, the Corfu Channel, Indonesia, Korea, Palestine, Kashmir, South Africa race conflict, Cyprus.

1. Fenwick-International Law (Third Edition) p. 340.
2. 159 U. S. 113.

It succeeded in settling many of these questions, the few that are still pending are receiving its serious attention. "The United Nations has been called upon in most of the political crises since the end of World War II—the Balkans, Iran, Palestine. the Corfu Channel, Kashmir, Indonesia, the Berlin blockade, Korea. Each case was different: sometimes open warfare had broken out, sometimes the crisis seemed about to tip the delicate balance of forces and precipitate a general conflict. All cases had something in common—the parties were stubborn, the debates tedious, the negotiations protracted. Only occasionally were clear-cut solutions arrived at, and some of the questions still remain to trouble the world. Kashmir for instance is still unsettled. The borders of Israel are still the scene of conflict and the uneasy armistice still governs where permanent peace is so badly needed. There were other situations in which little was accomplished beyond a debate. Yet most of the cases represent in varying degrees, an accomplishment of the United Nations system."[1]

In the legal field there has been no poorer achievement. The Charter lays the foundation of a world law. The General Assembly is authorized to initiate and make studies for the purpose of encouraging the progressive development of International Law and its codification. The Assembly has set up an International Law Commission which is steadily going on with its work of codifying the International Law that exists. A number of draft conventions have been prepared. The work is in progress and it is hoped that the task of codification would be accomplished. Besides this, the Assembly has sponsored a number of law making conventions which have added to the law. The International Court of Justice has justified its existence by its decisions and advisory opinions in many a difficult case. It has proved to be a potent force for the settlement of disputes. Its decissions have inspired confidence in nations with the result that more and more States are taking their disputes before it. " The interpretation and application of the Charter by the United Nations organs, the decisions of the International Gourt, the lawmaking and codifying activities not only of the United Nations but of regional bodies like the organization of American States and the Council for Europe are building slowly and unspectacularly the legal foundations on which a more secure world order can stand[2]."

1- Feller: United Nations and World Community p. 48.

2. Feller: United Nations and World Community p. 137.

The absence of legislation and judicial body in international sphere is referred to as a great defect in the International Law system. The yearly work of the Assembly in sponsoring conventions creative of general International Law and the readiness of the States to enter into multilateral treaties under the aegis of the United Nations together with the work of codification which is carried on by the Assembly leads to a conclusion that in due course of time the Assembly aided by its subsidiary organs will take up the role of a legislature and will become the most potent source of international Law. Further, the International Court of Justice which is becoming more and more popular and powerful will in all probability become a central judiciary capable of applying and enforcing law. Mr. Alwarez in his dissenting opinion in the case of the Competence of the General Assembly for the admission of a State to the United Nations observed: "In future it is to the General Assembly of the United Nations, to the International Court of Justice and to the jurists that we shall look more than to any one, for the creation of the new International Law."

CHAPTER II

SOURCES OF INTERNATIONAL LAW

Sources of Law defined.—The word 'sources' when associated with law has more than one meaning and is ambiguous in its import. The meaning assigned to the word by writers of international law is not always the same. The expression 'Sources of law' has been used by some writers to mean the basis of the obligations under the law. It has been implied to mean the causes of which law is the effect. The expression has also been used to mean the historical facts which give validity and force to the rules of law. It has also been used to mean places where the rules of law are first found. The word 'source' is also used as synonymous with evidence and the expression 'sources of law' is used as meaning evidences of law. The enquriy into sources of international law would depend upon the meaning that is ascribed to the expression 'sources of law' and it is, therefore, necessary before embarking on such an enquiry to fix the meaning of the expression. It will

be useful to notice the meaning assigned to the expression by eminent writers.

Oppenheim.—"Source of law' is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force."

Kelsen—"By 'source of law' not only the methods of creating law but also the methods of applying law may be understood."

Fenwick.—"While the term should be more properly applied to the historical facts which embody the recognition by States of the existence of the rules of law its use in the sense of evidences is readily explainable by the character of customary law." *Fenwick* seems to use the term in both senses that is as meaning historical facts embodying the recognition by States of the existence of law and also as evidences of the law.

Lawrence.—"If we take the source of a law to mean its beginning as law, clothed with all the authority required to give it binding force, then in regard to international affairs there is but one source of law and that is the consent of Nations......If on the other hand we take the sources of international law to be the places where its rules are first found, whether in an authoritative or an unauthoritative form, we must enter into an historical enquiry, and this we propose to do without committing ourselves to a dogmatic opinion as to which of the two senses of the phrase "sources of law" is the more proper."

Starke.—"The material sources of international law may be defined as the actual materials from which an international lawyer determines the rules applicable to a given situation."

Briggs.—"For reasons of clarity and precision it seems preferable to employ the term 'sources of international law' in a formal sense as indicating the methods or procedures by which international law is created Thus, when treaties are referred to as one of the sources of international law the reference should be regarded as indicating the treaty making method ; the substantive content of treaty is of international law (for the parties), or sometimes "evidence of international law."

Views on the Sources of Law.—The meaning assigned to the expression 'sources of law', it will appear, has an important bearing on the scope of the enquiry into the sources of the law. The classification of the various sources of the law also depends upon the main legal theory advanced by a particular writer. The meanings assigned to the expression 'sources of law' stated above will also be found coloured by the doctrines advanced by the writers who assigned the meaning. The different writers have given different classification of the sources of International Law It is desirable to set out the views of some eminent writers on the sources of International Law :—

Oppenheim.—"As the basis of the law of nations is a common consent of member—States and the Family of Nations—it is evident that there must exist as many sources of International Law as there are facts through which such common consent can possibly come into existence. The sources of international law are, therefore, two fold-namely :—

(*i*) Express consent which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties ;

(*ii*) Tacit consent, that is consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct.........

Treaties and customs must be regarded as the Exclusive Sources of Law of Nations."[1]

Justice Gray.—"International Law is part of our law, and must be ascertained and administered by the Courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose where there is no treaty and no controlling executive or legislative Act or a judicial decision, resort must be had to the customs and usages of civilized nations ; and as evidence of these to the works of jurists and commentators who by years of labour, research and experience have made themselves well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law

1. Oppenheim—International Law (7th Edition) p. 24.

ought to be but for trustworthy evidence about what the law really is."

Brierly.—Brierly accepts those sources of law which have been specified by Article 38 of the Statute of the International Court of Justice. He observes : "This is a text of the highest authority and we may fairly assume that it expresses the duty of any Tribunal which is called upon to administer international law."[1]

Statute of the International Court of Justice.—Article 38 of the Statute lays down.—

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states. (They conform to international treaties proper).

2. International custom, as evidence of a general practice accepted as law.

3. The general principles of law recognized by civilized nations.

4. Subject to the provisions of Article 59, Judicial decisions and teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules law.

Kelsen.—"In this treatise by sources of International Law the methods of creating International Law are meant. Whereas the two principle methods of creating national Municipal) Law are custom and legislation, the two principle methods of creating International Law are customs and treaties. Custom is the older and the original source of international law, of particular as well as of general International Law. At present treaties play an important part in the development of International Law. Hence the international legal order is composed of norms created by customs, customary international law and norms created by treaties-conventional international law. General international law is customary law. There is no treaty to which all the States of the world are contracting parties."[2]

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1. **Brierly.—The Law of Nations p. 58.**

2. **Kelsen.—Principles of International Law p. 304**

Starke.—"The material sources of International Law may be defined as the actual materials from which an international lawyer determines the rules applicable to a given situation. These materials fall into four principal categories or forms:—

(1) Customs.

(2) Treaties.

(3) Decisions of arbitral or judicial tribunals ; and

(4) Juristic works."[1]

Lawrence.—Lawrence enters into a historical enquiry into the sources of International Law by which expression he means the places where its rules are first found. According to the definition of the expression 'sources of law' he reckons the following as the various sources of international law.—

(1) The works of great publicists.

(2) Treaties.

(3) The decisions of prize courts, international conferences and arbitral tribunals.

(4) International State papers other than treaties.

(5) Instructions issued by States for guidance of this own officers and Tribunals.[2]

Sources of International Law.—Having seen the various definitions of the expression 'sources of law' it would be proper to assign to that expression two meanings which are consistent with each other. The expression should be applied to mean those historical facts which import binding force to a rule of conduct and also evidences which prove the existence of the rules of the international law. In view of the above meaning the sources of international law may be stated as.—

(a) Customs and Usages.

(b) Treaties.

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1. J. G. Starke.—In Introduction to International Law p. 30
2. Lawrence—The Principales of International Law.

(c) Decisions of courts and tribunals.

(d) Works of jurists and commentators.

(e) The general principles of law recognised by civilized nations.

Of the above sources the first two constitute the historical facts which impart legal force to the rules of International Law while the third and fourth in the above list form evidences of the existence of the law. The fifth source stated above finds place in the Statute of the International Court of Justice as a subsidiary means for the determination of the rules of law.

It is necessary to examine each of these sources for a clear understanding of the subject.

A—CUSTOMS AND USAGES

Customs and Usages.—Of all the various sources custom has played an important part in building up the system of International Law. Till the beginning of the twentieth century it was the most important of all the sources. Custom has lost much of its importance owing to a huge mass of treaties coming into existence in the recent past. It is still a fruitful source.

A customary rule of International Law may be defined as a rule which the states have since long been recognising as right rule of conduct. Customary rules have the full force of law. Custom is different from usage which means a habitual practice. A rule based on usage has no force of law. Usages may ripen into custom. There may be conflicting usages on a particular matter but there can be no conflict in case of a custom. This distinction is to be clearly borne in mind in dealing with custom as a source of law.

Two important defects of this source of International Law may however be noted. Firstly custom is slow in its growth and cannot keep pace with the quick changes in international relations. Secondly, the question whether a particular usage has or has not ripened into obligatory custom presents many difficulties. States do not often agree among themselves on a long established usage having become custom binding on them. In order that usage may be regarded as custom the usage must have been repeatedly followed by the States. One single act is insufficient to create custom. The recurrence of an act carries with it a conviction that the act has been accepted and has not been challenged by other States.

Further it raises a presumption that the act is likely to be repeated in future. The habitual course of conduct with regard to a particular matter has the effect of creating a binding customary law. The evidence of an usage may be furnished by the practice of international organs, acts and declarations of statesmen, opinion of advisers to the Government and State practice. It is the weight of the materials that will go to decide the question whether a customary obligatory rule has come into exisience.[1] An important test in determination of the question whether usage has crystallised into custom is furnished by the general attitude of the society of States. If the States generally acknowledge that a particular rule of conduct is binding on them, the transition from usage into custom may be regarded to be complete. In order that a rule may be held to be binding customary law it must be proved by satisfactory evidence that the particular rule is "of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it." This test of general recognition has also been accepted by the Statute of the International Court of Justice which in Art. 38 provides for the application of international custom "as evidence of a general practice accepted at law." "As usages have a tendency to become custom, the question presents itself, at what time does a usage turn into custom? This question is one of fact, not of theory. All that theory can say is this: Wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such cônduct is a rule of customary International Law."

Custom as Source of Law—A custom in international sphere comes into existence by habitual course of action on the part of the States. The fact that states have been for a long time behaving in certain manner in respect of a certain matter arising out of their dealings with each other coupled with the further fact that they feel it obligatory on them to behave in that manner establishes a custom. Such a custom is as good a source of law as legislation, with some difference in method. Brierly observed: "Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that if the usage is departed from some sort of evil consequences will probably, or at any rate ought to

1. West Rand Central Gold Mining Co. V. The King (1905) 2 K.B. 391 at p. 407.

fall on the transgressor; in technical language there must be a sanction, though the exact nature of this need not be very distinctly envisaged"[1]. It must be noted that a long established practice alone is insufficient to create a custom. The practice must also be regarded as binding by the states. Legislation is conscious while a practice which crystalizes into custom begins unconsciously. Legislation is the act of a Government organ while custom is made by the persons who become subject to that custom. Custom is a recognised source of both national and International Law. The origin of all law can be traced to custom.

It may be pointed out that article 38 of the Statute of the International Court of Justice requires the Court to apply "International custom as evidence of a general practice accepted as law." The custom is stated as mere evidence of general practice and not as a source of law. This article lays emphasis on general practice of states as the source of law. Now, the expression 'the general practice' accepted as law has probably been used to mean a long established practice adopted by states generally and recognised by them as binding and if this be the meaning of the expression, it necessarily implies all that is meant by the word 'custom'. The article interpreted in this manner supports the view that custom is a source of international law which the court is bound to apply. The necessary facts which go to make a custom, namely, a long established practice or course of conduct of the states and the view that the states consider such a course of conduct as binding do find place in this Article. It cannot be on the basis of this article argued that custom is mere evidence of a general practice and not itself source of law.

In the case of *West Rand Gold Mining Co.* vs. *The King*[2], it was stated that International Law "rests upon a concensus of civilized states not expressed in any code or pact, nor possessing, in case of dispute any authorised or authoritative interpreter; and capable indeed of proof, in the absence of some international agreement only by evidence of usage to be obtained from the actions of nations in similar cases". The custom, if proved on a certain matter will be taken to be a rule of international law. In the absence of treaties or pacts on a certain matter the custom evidencing long established practice of states in dealing with such a matter furnishes the best guide. Lawrence observes; "And we must never forget that no rule can have

1. Brierly : The Law of Nations p. 60-61.
2. (1905) 2 K. B. 391.

authority as law unless it has been generally accepted by civilized states. Custom is, as it were, the filter bed through which all that comes from the fountains must pass before it reaches the main stream".[1]

Standard of Proof of Custom.—Custom as source of International Law is difficult to prove. The difficulty is due to the fact that a party alleging a custom has not only to prove numerous instances of a particular course of conduct but also to establish that the states consider it a legal duty to adopt that course of conduct. Then, the courts before which the custom has to be proved, have to scrutinise the materials placed before them judiciously to see whether a valid custom has been established. The nature of instances, the status of the states concerned in those instances, the circumstances, leading to the particular course of conduct, the length of time over which those instances are spread, the occasions on which departure from that course of conduct was made, and the attitude of the states as regards belief in the obligatory nature of the course of conduct have an important bearing on the question whether the custom alleged has been proved. In international sphere an important consideration that arises is whether a particular custom is to be allowed to restrict the independence and sovereignty of the states.

"There is a clear relation between claims of sovereignty and the creation and judicial recognition of binding customary International Law. In few matters do judicial discretion and freedom of judicial appreciation manifest themselves more conspicuously than in determining the existence of International Law. The number and the importance of the states whose participation is necessary for the creation of custom ; the presence of the conviction that the conduct in question is followed as a matter of legal obligation ; the degree of relevancies in a particular situation, both of protest and of absence thereof; the determination whether the express adoption in treaties or otherwise of particular rules is expressive of existing or growing custom or whether the fact that the explicit adoption of such rule was deemed necessary points to absence of custom—with regard to all these questions there are no clear limits to the comprehensiveness of judicial freedom of appreciation."[2]

There are a number of cases where international courts and tribunal, from time to time in the course of dealing with questions of customery law have pointed out the nature of proof

1. Lawrence : The Principles of International Law. P. 96.

1. Lauterpacht : The Development of International Law through International Court of Justice P. 368.

required to establish a custom. The Permanent Court of Arbitration in the case of the *North Atlantic Coast Fisheries* (1910) had to find whether it was a custom that only bays of ten miles width are reserved for fishing for the nationals. Several treaties embodying this rule were produced. Evidence showing that in the course of negotiations between Great Britain and the United States a similar rule on various occasions was proposed and adopted by Great Britain in its instructions to the naval officers stationed on those coasts was also placed before the court. The Court observed: "Though these circumstances are not sufficient to constitute this a principle of International Law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers."

In *the Lotus case* (1927) the Permanent Court of International Justice was called upon to accept a custom to the effect that only a flag state in cases of collision at sea can initiate proceedings. It was argued on behalf of the French Government that the rarity of criminal proceedings in collision cases was proof of the alleged custom. The Court did not accept the argument and observed that the rarity of criminal proceedings in collision cases "would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so ; for only if such abstentions were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that states have been conscious of having such a duty." This case reaffirms the view that a mere habitual conduct is in itself inadequate to create law ; it must be accompanied with the further fact that the conduct is regarded as a duty.

In the *Asylum case* (1950) Columbia put forward the case before the International Court of Justice that there existed a customary rule among Latin American States to the effect that the State granting asylum had the right to determine itself whether circumstances and nature of the offence justified the grant of asylum. Columbia relied on some cases in which asylum was actually granted and respected. The Court of International Justice referred to Art. 38 of its statute and took the view that "the Columbian Government must prove that the rule invoked is in accordance with a constant and uniform usage practised by the states in question and that usage is the expression of a right appertaining to the State

granting asylum and a duty incumbent on the territorial State." The Court ultimately held that the customary rule pleaded by Columbia was not established in regard to the facts placed before it the court observed: "The facts brought to the knowledge of the court disclosed so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of the diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum ratified by some states and rejected by others and the practice has been so much influenced by considerations of political expediency in the various cases that it is not possible to discern in all this any constant and uniform usage accepted as law with regard to the alleged rule of unilateral and definitive qualification of the offence." This case lays down that a practice followed on merely political grounds cannot ripen into a custom. Another principle that follows from this decision is that the fact that the alleged rule was incorporated in a treaty militates against the view that the rule ever formed part of law.

In its Advisory Opinion the International Court of Justice on the question of Reservations to the Genocide Convention (1951) took the view that "examples of objections made by reservations appear to be too rare in international practice to have given rise to such a rule." The question in this case was whether it was a binding customary rule that unanimous consent of all signatories of a treaty was necessary to a reservation appended by a state desirous of becoming a party to the treaty. In giving its opinion the Court considered the circumstances which led to the Genocide Convention and other factors attending the case and held that 'a more flexible' application of the rule about unanimous consent to reservation was called for. Commenting on this decision Lauterpacht expresses the view that "the opinion of the Court in the case of the Reservations to the Genocide Convention must, notwithstanding some of the arguments contained therein, be regarded not as a denial but as a development, through the technique of apparent judicial legislation. of the customary law on the subject."

As stated earlier, it is always difficult to adduce evidence of a satisfactory type about the fact that a course of conduct was followed under a sense of legal duty, for many cases will hardly stand a rigid test. Since it is an essential element of custom that the rule of practice involved was followed under a sense of legal obligation it is not possible to dispense with the proof

of it. This requirement refers to the subjective aspect of custom necessitating the determination of *opinio necessitis juris i.e.*, the consciousness that the course of conduct was followed under a sense of legal obligation. But the courts in the interest of development of Law have freedom to soften the regour of the rule as to proof Lauterpacht suggests a solution in these words :

"Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention. The judgment in the Asylum case not inconsistent with some such approach...... ....While it is impracticable to demand positive proof of the existence of legal conviction in relation to a particular line of conduct, it is feasible and desirable to permit proof that in fact the *opinio necessitatis juris* was absent.[1]"

Lastly, a customary rule of International Law cannot be accepted when it is opposed to recognised principles of justice, morality and public convenience. A custom is also to be reasonable Pitt-cobbett states the rule thus : "Finally, just as considerations of justice and humanity, of public convenience, and "the reason of the thing" enter into both the making and the interpretation of the unwritten law of England, so it may be said that considerations of morality, of conformity to existing principles, and of intrinsic reasonableness will not only be taken count of in the interpretation and application of admitted rules of international law, but also in cases of doubt constitute an important factor in determining the obligatory character of international custom."[2]

Evidence of Custom.—A customary rule of International Law has to be proved by some evidence. In international sphere the documents provide such evidence and constitute primary evidence of the recognition of an obligation as manifested in repeated acts and professions. Those documents which

1. Lauterpacht : The Development of International Law through International Court of Justice p. 380.

2. Pitt-Cobbett : Cases on International Law p. 9.

show that a particular practice or course of conduct was asserted, claimed, denied, followed, or recognised by States will form good evidence of custom. An exhaustive list of the kinds of documents which furnish proof of custom cannot possibly be prepared. But it would be safe to state that all papers and documents which exhibit the behaviour of states with regard to the matter in question would form evidence of a customary rule on that matter. The evidence of a custom would ordinarily relate to the practice of states, its frequency, assertion or denial of such practice, the reasons if any behind the practice and other circumstances relevant to the practice.

Besides the decisions of Courts and Tribunals and the works of jurists, commentators and publicists which will be discussed separately, the state papers of all kinds furnish evidence of custom. The records of the Governments of a State consist of numerous kinds of papers which speak of the practice followed by it and other states with which it has dealings. Some State papers are irrelevant from legal point of view ; others may be important to prove a certain practice. The diplomatic correspondence, the declarations made by the statesmen, heads of the states or a state department the instructions issued to military and naval commanders, the executive actions taken by the states on the matter in question and opinion of legal advisers of the States may contain very good evidence of a certain course of conduct.

Broadly classifying, the various state papers fall into three categories namely (1) diplomatic correspondence, declarations made by statesmen, heads of states and of state departments legal opinions of Advisers to the Government of States and the statements of spokesmen of the States ; (2) instructions issued by states to their own officers and organs ; (3) records of executive action taken by the states ; (4) Resolutions of international conference and institutions. The importance of these papers as evidence may be stated :

1. Diplomatic Correspondence, Declarations, and Legal Opinions.

There are a number of occasions on which States communicate with one another. Complaints are also made by one State to the other on what the complaining state fee's aggrieved. Negotiations also take place between them. All this diplomatic correspondence generally contains illuminating discussions on points in controversy and disclo-

ses the behaviour of the states; although the diplomatic coerrespondence often reveals the views of those in charge of foreign relations, it is entitled to respect for the reason that it generally embodies sound opinions of high officials zealous for the truth. It is rare to find in such correspondence assertions at variance with accepted principles of justice and morality. The legal arguments made in diplomatic correspondence are always indicative of the attitude of the nation on whose behalf they are put forward.

The declarations made by statesmen, spokesmen of the States, heads of the Governments and State departments provide good evidence on the matter dealt with by them, as they express the will and the mind of the State on whose behalf they are made. These, in the absence of prompt and effective dissent by some Great Power, tend to be expressions of a recognised rule of International Law. An example of such declaration is furnished by War of 1898 between Spain and the United States. The belligerants were not signatories to the Declaration of Paris of 1856 and were therefore not bound by the principles laid down by it. When war broke out the United States proclaimed that it adhered to the principles of the Declaration of Paris. No dissent was offered by the enemy and the result was that throughout the War both the belligerants acted upon the Declaration.

2. Instructions issued by States to their own Officers and organs.

These instructions although they possess the domestic character are often expressive of the attitude of the Government issuing them and are capable of furnishing good evidence of the practice of the issuing state. When issued with care and legal advice these instructions shed light on important matters connected with the practice and policy behind the practice. Lawrence observes: "But though they have no other object than the regulation of the conduct of the agents and servants of the government that issues them, they may have a far wider effect than was intended or expected by their author."[1]

States subject to international obligations generally issue such instructions to their officers, agents and organs as may not bring them into conflict with rules of international law.

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1. Lawrence: The Principles of International Law p. 110.

These instructions clearly show the behaviour of the States which issues them. They are to a great extent indicative of the practice of the State and also of the rules of International Law on matters involved in them.

Sometimes these instructions, if carefully prepared, tend to become model rules for other states to follow and in course of time to become recognised rul s of International Law. Instructions for the Government Armies of the United States in the field issued on April 24, 1863, though meant for the guidance of the American armies, became the basis of rule of warfare. They gained the respect and admiration of other nations and furnished good material for the laws and customs of war on land of the Hague Conventions. The French ordinance of 1861, though meant to be a guide to French cruisers and tribunals, became in course of time a source of prize law for all nations.

3. **Records of Executive actions.**—The states in discharge of their executive functions lay down policies and take actions in pursuance of the policies. Their policies and actions with regard to matters touching international affairs are apt to furnish evidence of their course of conduct in relation to other states. Administrative and executive proposals and practices go a long way in proving a rule of customary law.

4. **Resolutions of international conferences and institutions.**—Many International Conferences stand as landmarks in the history of the development of International Law. The Hague Conventions for example, achieved a great success in those days when the rules of International Law on the topics dealt with by them were obscure. The resolutions of these conferences unmistakably evidence the consent of the states attending the conferences and prove to be a good source of customary International Law.

The international institution like the League of Nations and the United Nations have an unique place in the world. Their resolutions represent the views of nearly all the nations of the world and furnish conclusive proof of the principles embodied therein. The resolutions of the General Assembly affirming a certain principle or rule of law impart authorititative recognition of these rules.

B. TREATIES

Treaties.— In recent times Treaties have become a very important source of International Law. The impor-

tance of the treaties lies in the fact that they embody rules which have been agreed to be binding by the states making them. All kinds of treaties cannot however be sources of law. A treaty between two states cannot be binding on other states and can not lay down any rule of International Law. Since such a treaty gives a rule which has binding force between the states making it, it is capable of laying down particular International Law. These treaties have the potentiality of becoming source of International Law if other states or a majority of them enter into similar treaties.

The law making treaties are those which have been entered into by all or nearly all the states of the community of nations. These treaties lay down rules which are binding on the states in general and therefore are good sources of law. The law laid down by them may be called universal International Law. The General Treaty for the Renunciation of War, 1927 may be cited as an example of law-making treaty.

A third kind of treaty may be one which has been entered into by a small group of states including Great powers. Such a treaty lays down 'general International Law.' If it is later on acquiesced in or formally recognised by the remaining states, it becomes a full law-making treaty and source of Universal International law. The Declaration of Paris of 1856 furnishes a good example of such a treaty. It was originally a treaty entered into by a small number of states but later on, in respect to privateering and certain rights of neutrals it became a full law-making treaty. The other instance is furnished by the Geneva Red Cross Convention of 1864. After the establishment of the League of Nations there came into existence a number of conventions or multipartite treaties for the promotion of common international interests. These conventions laid down rules for the members of the League of Nations on different common economic and social problems. The activities of the International Labour Office resulted in numerous treaties in which the principle of uniform legislation for the protection of labour was recognised. These and many other multipartite treaties constituted good International Law.

Law-Making Treaties.—Legislation in International sphere takes place through treaties. As already stated all treaties are not the source of law and cannot be said to be making

law. Treaties the object of which is to formulate rules of future conduct meant to be binding on all the states or a large number of States or to declare the rule of law with respect to some matter are law-making treaties. Such treaties may either be entered into by all or a large mumber of States. Brierly defines law-making treaties as " those which a large number of States have concluded for the purpose either of declaring their understanding of what the law is on a particular subject or of laying down a new general rule for future conduct or creating some international institution."[1] Treaties entered into by a small group of States laying down a certain rule of conduct, if later on accepted and acted upon by a large number of other States will assume the character of law-making treaties and since they are not capable of legislating at the time when they come into existence they are excluded from the category of law-making treaties. Speaking of such treaties Lawrence observes : " It is clear that treaties of this kind are not sources of International Law, only in one case can they become so, and that is when the new rule first introduced by one of them works so well in practice that other states adopt it. If they take it up one by one till all observe it, the first treaty in which it appears is its source, though a long interval of time may separate its original appearance from its final triumph."[2]

The distinction between law-making and other treaties is not at all approved by *Kelsen* who says : " However, this distinction is incorrect. For law in general and conventional law in particular is a means to an end, not an end in itself. It is the essential function of any treaty to make law, that is to say, to create a legal norm, whether a general or an individual norm. Any purpose-political or economic of states, when pursued by means of a treaty, is realised in the form of law ; and any so-called law-making treaty has a political or economic purpose." According to this view every treaty is law-making treaty, for a treaty between two states does nothing but prescribes a rule of conduct binding on the contracting parties. A treaty which lays down a rule for the contracting parties does not bind third states and has no legal efficacy for third states. It is not law.making in the sense that it gives rise to a rule of law-binding on all or a large number of states. The expression 'law-making' treatise' used here means only those

1. Brierly : The Law of Nations p. 59.

2. Lawrence : The Principles of International Law p. 105

3. Kelsen : Principles of International Law p. 319, 320.

treaties which operate over all or a large number of states. A treaty between two states may in course time be acceptable to a large number of states and may become a law-making treaty. Such a teaty at the time it is entered into is a contract-treaty as opposed to a law-making treaty. The difference between treatise which are law-making and those which are not lies in the area of operation, for a rule of conduct prescribed by a treaty for a large number of states is apt to be followed by those states which are not parties to it while a treaty governing the relations of a few states does not necessarily furnish a guide to a large number of states not parties to it.

Law-making treaties are either legislative in their nature or mere declaratory in effect. Treaties which lay down rules for proper conduct are legislative in nature while those which only give a legal form to the existing practices of states or which in effect declare the rules of law already in operation are declaratory. The declaration of Paris of 1866 on maritime law and the Hague Conventions of 1899 and 1907 are treaties which legislate while the unratified Declaration of London of 1909, the Conventions of the Armed Nentralities of 1780 and 1800 are declaratory of the rules already existing in practice. Since the middle of the nineteenth century there has been a large increase in the number of law-making treaties. As slow custom proved inadequate to give rise to rules necessary for the international society, the nations diverted their attention to legislation by consent through the medium of conventions and treaties. The states in their common interests bound themselves by rules laid down by them in treaties and conventions. A large number of treaties which are either legislative or declaratory were concluded during the period 1864-1914. Legislation through treaties has received general acceptance because of so many difficulties of proof of the other sources of the the law.

The Covenant of the League of Nations was a multipartite treaty which by reason of the fact that it lays down new principles of law and created new obligations for the State can be treated as a law-making treaty. The establishment of the League brought nations closer to each other resulting in promotion of common interests. Numerous matters of common interest required regulation and the States for mutual benefit entered into in large number of treaties and conventions. The economic and social interests received great attention and their advancement was secured through the medium of elaborate treaties. This method of law-making has greatly added to the rules of International Law. International co-operation

in many a field was ensured by the adoption of a series of multipartite Conventions. In respect of matters connected with public health, public safety and welfare, labour, industrial relations, and social relations a number of conventions *e. g.* Convention on safety of life at Sea (1929), Convention for the Suppression of the African Slave Trade (1926) ; Convention for the Suppression of Traffic in Woman and Children, Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, Convention Limiting Hours of Work in Industrial undertakings to eight in the day and forty-eight in the week, Convention concerning employment of women before and after childbirth were concluded to the benefit of a large number of nations.

The United Nations Organisation,expressly aims at promotion of common political, economic and social interests of its members. The Assembly is required to make recommendations for the purpose of promoting international co-operation in the political economic, social, cultural, educational and health fields and assisting in realisation of human rights and fundamental freedoms. These aims and objects can be achieved only through the medium of conventions concluded at International Conferences. The Economic and Social Council of the United Nations is charged with the duty of initiating studies and making reports with respect to international economic, social, cultural educational, health and other related matters. It has to prepare draft conventions and submit them to the Assembly. The conventions if concluded at International Conferences by member-states would become law-making treaties. The programme of the United Nations as detailed in the Charter and the work that has so far been done by the Organisation offers an assurance that all kinds of matters of common interests would form the subject matter of multipartite treaties laying down rules for future guidance.

C. DECISIONS OF COURTS AND TRIBUNALS

1. **Decisions of Courts and Tribunals.**—The decisions of International and national courts and those of Arbitral Tribunals do not only constitute valuable evidence of the rules of International Law, but a substantial source of that law. The courts and tribunals do not profess to legislate but declare the law on a particular point. Their judgments furnish evidence of the rule of law declared therein and thus give to rules of International Law stability that they need. The courts and tribunals both in the national and international

sphere have made important contributions to the development and clarification of law. They do not only clarify the law on a particular point but find out by judicial reasoning the particular rule of law governing the matter in issue. In their anxiety to keep the scales of justice even they approach the question before them in a disinterested manner and reach a conclusion which appears to them just and proper. Their decisions furnish an exposition of law better than that of the commentators and writers who generally approach the questions of law with their own particular ideology.

Article 38 of the Statute of the International Court of Justice describes judicial decisions 'as subsidiary means for the determination of rules of law.' Although the doctrine of judicial precedents does not prevail in international sphere, there can be no doubt the decisions of international and national courts and arbitral tribunals are treated with respect. In asmuch as their decisions are binding only on those States which were parties to the case decided by them, they can only have a persuasive effect on third States. By reason of being possessed of a persuasive effect these decisions serve an important purpose in a field where there does not exist either a legislative or an executive body. *Schwarzenberger* speaking of the effect of judicial decisions observes :

> "Nevertheless, it would be a mistake to over-estimate the difference between the binding and persuasive authority of international or national judgments. A better reason is the greater degree of responsibility and care that the average lawyer shows when he deals in a judicial capacity with real issues as compared with mere comments on such issues or the discussion of purely hypothetical cases. Furthermore, it should be remembered that such cases are argued by experienced advocates from two or more angles and the more representative international courts are composed of several members with widely differing training and experience."[1]

Apart from their persuasive force, the decisions of the international courts and tribunals furnish an important source of the rules of International Law. These courts and tribunals within the scope of their limited authority are continually engaged in judicial legislation. They make law when necessary by means that are un-objectionable and imperceptible.

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1. Schwarzenberger : A Manual of International Law p. 78.

A careful study of the judgments of the various courts and arbitral tribunals in the international sphere will show that the decisions of courts and tribunals have played an important part in the development of International Law in spite of the fact that they possessed a much too restricted jurisdiction.

2. History of International Courts.—The foundations of an international court of justice were laid by the First Hague Conference which established the Permanent Court of Arbitration. This Court was permanent in name only ; it used to come into existence whenever parties to a dispute agreed to refer their dispute for adjudication. A list of judges nominated in advance by the contracting parties was maintained and whenever a matter of dispute was agreed to be referred, the parties to the dispute had each to choose two arbitrators from that list. The arbitrators chosen by the parties were to appoint an umpire. These arbitrators with the umpire constituted the Permanent Court of Arbitration for decision of the matter referred to it. The signatories to this Convention were under no obligation to refer their disputes to the Permanent Court of Arbitration. They only recognised arbitration 'as the most effective, and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.' Although the reference to arbitration was not readily agreed to by States having differences, the establishment of Permanent Court of Arbitration showed a way to nations to a new means of settlement of disputes, that is to say, arbitration. During the period between the first and second Hague Conferences a number of bilateral treaties were entered into for the purpose of settling disputes by arbitration.

The first important treaty for arbitration was the Argentine-Chilean Treaty of 1902 which required the contracting parties to submit to arbitration "all controversies between them of whatever nature they may be, or from whatever cause they may have arisen except when they affect the principles of the Constitution of either country and provided that no other settlement is possible by direct negotiations."

Then there was the treaty of 1903 between Great Britain and France which went a step further than the Hague Convention in making it obligatory on the contracting parties to refer their matters of dispute to arbitration. This was followed by the Second American Conference at Washington on International Arbitration in 1904.

The Second Hague Conference of 1907 reaffirmed the fact that arbitration was the most effective and equitable means of

settling international disputes. In order to bring about an impartial tribunal the Conference decided that of the two arbitrators chosen by a party to the dispute only one should be its national or chosen from among persons selected by it as members of the Permanent Court. A draft Convention Relative to the creation of a Judicial Arbitration Court was also adopted but it was not accepted by the Signatory Powers.

After the second Hague Conference efforts were made to make arbitration more acceptable to nations by classifying controversies that might be decided by arbitration. The question that arose was whether only legal disputes were to be referred to arbitration. The Root Treaties of 1908 between the United States of America and a number of other States were entered for the purpose of ensuring peaceful settlement of differences on a legal point and on interpretation of treaties. The Root Treaties required the contracting parties to refer such disputes to arbitration, but they did not have the desired result, as many differences that arose or were likely to arise fell within the exceptions to the clause for arbitration. On the eve of the First World War a number of Treaties for the advancement of Peace providing for reference to arbitration of all disputes of whatever nature were made by the United States. These treaties were designated as Cooling-off treaties as they had the effect of postponing war. Their great defect lay in this that did not impose an obligation on the contracting parties to abide by the award of the arbitrators. The First World War gave the nations a rude awakening to realities and the futility of the methods of peaceful settlement of international disputes.

The League of Nations brought into existence the Permanent Court of International Justice. The statute of the Court provided for a general and a special jurisdiction. In the exercise of its general jurisdiction the Court had the power to decide matters referred to it by the States who were under no obligation under the Covenant or the Statute to refer their disputes to the Court. This jurisdiction extended to matters concerning the interpretation of treaties, questions of International Law,cases involving breach of international obligations and regarding reparations to be made for the breach of such obligations. The special jurisdiction of the Court was dependent on treaties that States might enter into for referring their disputes to the Court. The Court also possessed an advisory jurisdiction in exercise of which it was competent to give its opinion on any matter referred to it by the Council or the

Assembly of the League. The opinion of the Court had however, no binding effect on the Council or the Assembly which had a freedom to come to a different conclusion.

After the close of the Second World War and with the ratification of the Charter of the United Nations a new court called the International Court of Justice came into existence. The Statute of the International Court of Justice which forms an integral part of the Charter is based upon the Statute of the former court, that is to say, the Permanent Court of International Justice. The jurisdiction of this court extends to all cases which the parties may refer to it and all matters specially provided for in the Charter or in the treaties or conventions in force. It is for the States to agree to confer compulsory jurisdiction on the Court.

3. Decisions of the International Courts as Source of Law.—The existence of some sort of court whether in national or international sphere implies a source of law. The Courts are shy to admit that they make law ; they only say that they find out the law and declare it as governing a particular matter. But the fact is that courts play an important role in the development of law and are responsible for many a new rules. This is true both of national and International Courts. *Schwarzenrberger* speaking of the Permanent Court of International Justice says :

> " Wherever there are courts, the law grows in the hands of the judges yet, as a rule courts are shy of saying so openly. They prefer to find the law and to maintain the pious fiction that they have merely applied the law as it stands. Even to the most casual observer it is evident how much the Permanent Court of International Justice, for instance, has developed the law as it stood when the Court was established."[1]

The International Courts unlike the national Courts in performing the judicial function have to proceed with great caution and hesitation in their exposition of the law they have to administer. They cannot profess to explore the possibilities of development; they have the duty of applying the law in force. Although they have to examine the facts to find out the law and to give reasons for the application of the law, they

1. Schwarzenberger : International Law Vol. I—p. 18.

cannot afford to speculate on the law, and also cannot lay down a rule which favours their personnal ideology. They have a duty to inspire confidence in the litigating parties and therefore have to act with particular restraint. But in spite of all this, there can be no denial of the fact that they are constantly busy in making law. *Lauterpacht* observes :

> "It is not their function deliberately to change the law so as to make it conform with their own views of justice and expediency. This does not mean that they do not in fact shape or even alter the law. But they do it without admitting it, they do it while guided at the same time by existing law ; they do it while remembering that stability and uncertainty are no less of the essence of the law than justice ; they do it, in a word, with caution. The same considerations apply to the administration of international justice."[1]

It may thus be noted that although the international cases have to proceed with caution and particular restraint, its discharge of judicial function leads to the development of law. An imperceptible process of development of law is implicit in the discharge of a judicial function. Again *Lauterpacht* speaking about the legislative work of the Court observes :—

> "The denial on the part of the Court or of individual judges of any intention to legislate is legitimate and proper. Any contrary attitude would constitute usurpation of powers—doubly dangerous in international sphere. This does not mean that they have been able to avoid decisions of a legislative character. Judicial legislation, so long as it does not assume the form of a deliberate disregard of the existing law is a phenomenon both healthy and unavoidable."[2]

The Permanent Court of International Justice the first of its kind, has to its credit many decisions which stand out as giving a clear and correct exposition of many a rule of International Law. During the period of its existence the Per manent Court in spite of the restraint with which it functioned, made an important contribution to the development of law. In its first case, the *Wimbledon*[3] (1923) the Court while acting with restraint in refusing to lay down the law on

1. Lauterpacht : The Development of International Law throug h International Court—p. 75.
2. Ibid.
3. (1923) P. C. I. C. Ser. A No. 1.

international servitudes, thoroughly dealt with the question of interpretation of treaties and matters relating to the rights and duties of neutral powers. There are other cases where the Court laid down rules of International Law in a manner which cannot raise a suspicion that it was performing legislative function. The Court had a good opportunity of legislating when it had to apply the general principles of law in accordance with Article 38 of the Statute and also when it had to deal with a case to which no existing rule of law applied. Also, in cases where the application of equitable rules and principles of international morality was called for the court had a freedom though somewhat restricted of making law. The Internatioaal Court of Justice like its predecessor is adopting the same methods of judicial legislation. *Lauterpacht* enumerates five ways in which the Court is carrying on judicial legislation and these are :—

> "In the first instance, as stated, an appearanee of legislative novelty has occasionally been created as the result of the application of a gereral principle of law. Secondly, judicial legislation by the Court has taken the form of reliance on principles, which, though of apparant novelty, have done no more than give effect to and draw the consequence from parallel developments in other spheres of International Law. Thirdly, the Court has rendered decisions in which, proceeding on the assumption that there was no generally accepted rule of International Law on the subject, it laid down principles governing the matter. Fourthly, on a number of occasions it has allowed what it considered to be the flexibility of International Law to serve as a basis of decisions of a legislative character. Finally, while adopting a conservative view of its powers to adjudicate *ex aequo et bono* at the request of the parties, it has at all times attempted to regulate, in a manner going beyond the interpretation of the existing law, the interests involved in the dispute before it."[1]

From a practical point of view the decisions of International Courts furnish an important source of International Law and they are not in fact merely 'subsidiary means for the determination of the rules of law.' *Lauterpacht* speaks with authority when he says : —

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1. Lauterpacht—The Development of Internationol Law through International Court—p. 156.

"International tribunals when giving a decision on a point of International Law, do not necessarily. choose between two conflicting views advanced by the parties. They state what the law is. Their decisions are evidence of the existing rule of law. That does not mean that they do not in fact constitute a source of International Law. For the distinction between evidence and the source of many a rule of law is more speculative and less rigid than is commonly supposed. Witness the animated, but highly unreal, controversy as to whether judges create the law or whether they merely reveal the rule already contained in *gremio legis*. Witness the indifference with which lawyers are prepared to accept the paradoxical assertion that judges are at the same time docile servants of the past and tyrants of the future. The imperceptible process in which the judicial decision ceases to be an application of existing law and becomes a source of law for the future is almost a religious mystery into which it is unseemly to pry........

For the reasons stated, previous decisions of the court are, as a matter both of legal principle and of actual experience, one of the enduring factors which influence its future decisions. They are evidence of of what the Court considers to be the law ; they are a reliable indication of the future attitude of the Court ; for most practical purposes they show, therefore, what International Law is. In fact they are to a substantial degree identical with the sources of law enumerated in the first three paragraphs of Article 38. In form they may be merely a subsidiary means for determining what these sources are. The effect is the same."[1]

4. Decisions of Arbitration Courts and Tribunals as source of Law. The Permanent Court of Arbitration established by the first Hague Conference and tribunals for arbitration created under treaties by the disputing States have done valuable work and it would be too much to ignore their contribution to the development of International Law. It is

1. Lauterpacht :- The Development of International Law through International Court—p. 21-22.

sometimes said that the arbitral tribunals in their anxiety to please both the parties do not deliver legal and impartial awards. *Lauterpacht* refutes this charge and observes: "It may be difficult to substantiate that charge. An analysis of the awards given by the tribunals under the aegis of the Permanent Court of Arbitration, before and after the First World War must reveal that their decisions were legal awards in form and substance."[1] Although the arbitral tribunals had a much restricted jurisdiction, they produced awards which will always remain as valuable monuments of exposition of some of the intricate principles of law. The decisions in the *Alabama Claims*[2] and *The Behring Sea Fisheries*[3] furnish notable instances of the work of arbitral tribunals in the development of International Law.

The arbitral tribunals by the peculiar nature of their jurisdiction are not always competent to elucidate or declare the law. Their jurisdiction is limited by the terms of the agreement of the parties. Sometimes the States lay down the principles of law on which they desire their disputes to be decided and the award that follows on such an agreement can add nothing to the law. But arbitral Tribunals in cases where the parties authorise them to decide the dispute *ex aequo et bono* (equitably in disregard if necessary of existing law) are capable of laying down the law. The decisions of such tribunals though not legally binding on States other than those which were parties to the arbitral agreement possess a very high persuasive value and directly help in the development of the law.

The Permanent Court of Arbitration as well as other Arbitral Tribunals have to their credit many decisions which are often relied upon by the nations in their litigation and by the lawyers. The cases of the *Pious Fund* (1902, the *carthage* (1913), the Norwegian claims case (1922) the *North Atlantic Fisheries* Case (1919), the Behring *Sea Fisheries Arbitration* (1893), the *Alabama* claims *Arbitration* (1872), the Eastern Extension Australia and China Telegraph Co., the Trail *Smelter Arbitration*, the *Cysne* (1930), the *Coenca* Brothers, the Rzni claims, the Naulilaa Incident and case of certain Finnish Vessels used during the war may be cited as illustrative of the work of these Tribunals. A careful study of these and other decisions will reveal that the arbitral tribunals deciding them have decided legal points in a manner which may be of credit to any court of law. The exposition of law

1. Lauterpacht: The Development of International Law by the International Court p. 6.
2. (1872) 1 Moore, International Arbitrations 653.
3. (1893) 1 Moore, International Arbitrations p. 755.

made therein and the decisions taken are enough to dispel all doubts about the impartiality of these tribunals.

These decisions were referred to in many a case both by the Permanent Court of International Justice and the International Court of Justice. They have added to the law and furnish a good source of law. *Lauterpacht* speaking of the value of these decisions observes :

> "Numerous arbitral awards have made a distinct contribution to International Law by reason of their scope, their elaboration and the consciousness with which they have examined the issue before them."

The arbitral tribunals cannot be said to have played the role of negotiators between nations and their decisions cannot be characterised as compromises designed to please both the parties. Their work clearly shows that they have acted both judicially and impartially and its value cannot be diminished or ignored by reason of the fact that they are creatures of the contesting parties. *Moore* speaking of their work observes : "I have failed to discover support for the supposition that International arbitrators have generally a special tendency to compromise or that they have failed to apply legal principles, or to give weight to legal precedents Indeed, even in the abridged form in which many of the decisions cited in my History and Digest of International Arbitrations published in 1898 were necessarily given in that work, nothing is more striking than the consistent effort to ascertain and apply principles of law approved by the best authorities, and to follow pertinent prior adjudications where they existed."

5. National Courts and their decisions as source of Law.—The decisions of national courts on questions of International Law also have made a good contribution to the development of the Law These national courts, specially of Great Britain and the United States have to their credit some very important decisions embodying admirable exposition of law on many a matter. It is significant to note that the decisions of national courts exhibit the attitude of the State to which these courts belong about a particular question of law and this attitude is expressive of the practice of that State. The decisions of these courts do not only make an exposition of law as understood by them but also show the practice of the State to which they belong. These decisions are real sources of law and cannot be considered to be merely subsidiary measures of determination of law. Marshall Chief Justice of the United States of America in the case of *Thirty Hogshead of Sugar*

v. *Boyle*[1] observes: "The decisions of the courts of every country and tribunals show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." The national courts while applying International Law are engaged in a work similar to that of the International Courts and the decisions of the former have the same value as a source of law as of the latter. The fact that the authority of the national courts is circumscribed by the National Law to which they owe their origin cannot be used to diminish the value of their decisions. The decisions of the High Court, the Judicial Committee of the Privy Council and the House of Lords in England and those of the Supreme Court of the United States of America have greatly contributed to the clarification and development of law.

The decisions of the national courts reveal that when they make an enquiry into a rule of International Law applicable to the case before them they do not act haphazardly but proceed judicially and do not apply a rule unless they feel satisfied as to the validity and the applicability of that rule. In the case of *West Rand Central Gold Mining Co., Ltd.*,[2] Lord Alverstone C. J. when faced with an enquiry into a particular rule of International Law observed:

> "But any doctrine so invoked must be one really accepted as binding between nations and the International Law sought to be applied must, like anything else, be proved by satisfactory evidence which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilised State would repudiate it."

Again in the case of *Chunng Chi Cheung*[3] Lord Atkin observed:

> "The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

These cases illustrate the method which national courts adopt in establishing a rule of International Law and the care

1. 9 Cranch 191, 198.
2. (1905) 2 K. B. 391.
3. All India Reporter 1939 P. C. 69.

and ability which they bring to bear upon the task naturally entitles their decisions to considerable respect. These courts do not merely reflect the local interpretation of the principles of International Law but influence the development of law by their method of judicial reasoning. The decisions of the national courts have also greatly influenced the determination of the policy of the home Governments. They have a highly persuasive value with courts of foreign countries as evidence of the rule of law laid down by them. Their value as sources of law is in no way less than that of the International Courts.

6. Prize Courts and their decisions as source of Law. The decisions of national courts and in particular national Prize Courts which administer not the municipal but the International Law greatly contribute to the development of the law, because they embody the local interpretation of the principles of law. The municipal courts are not agents of the States to which they belong and their decisions constitute authoritative source of International Law in as much as these contain full exposition of the principles of law on a particular matter. The mere fact that the influence of these courts which are national in character in moulding the International Law has been very great. They possess high ideals of duty and their decisions cannot be regarded but impartial. In the leading case of the *Maria*[1] it has been laid down that the duty of the English Prize Court is "not to deliver occasional and shifting opinions to serve present purposes of national interest, but to administer with indifference that justice which the Law of Nations holds out, without distinction, to independent States, some happening to be neutral, and some belligerent : the seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality." Again, in the case of the '*Recovery*'[2] it was observed that "it is to be recollected that this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own ; and what foreigners have a right to demand from it is the administration of the Law of Nations simply." It would thus appear that the decisions of prize courts on international matters are entitled to respect as embodying impartial interpretation of the Law. "The decisions of the courts of every country so far as they are founded upon a law common to every country will be

1. 6 Rob. 340.
2. 6 Rob. 341.

received not as authority but with respect. The decisions of the courts of every country show how the Law of Nations in the given case is understood in that country and will be considered in adopting the rule which is to prevail in this."[1]

The decisions of the Prize Court of one country are bound to influence the decisions of similar courts of the other countries and the reciprocal influence results in uniformity of law. When a rule of law laid down by a Prize Court of one country is accepted by a similar court of another country, it tends to become incorporated into International Law. These courts are often presided over by lawyers of great learning and integrity. English and American prize courts have set up a very high standard of learning and impartiality and their judgments have enriched the literature of International Law. Both *Stowell* in England and *Story* in America are responsible for many a new rules of law, the correctness of which has never been doubted. The doctrine of Continuous Voyage will always remain associated with *Stowell*. The decisions of the Prize Courts of every country, if carefully studied, would be found to have added to the rules of International Law. The mere fact that they belong to a particular State is not enough to disentitle them to respect which they generally richly deserve. *Lauterpacht* in assessing value of the decisions of municipal courts as sources of International Law says :—

> "The authority, in this respect, of decisions of International Tribunals is in a different category from that of the municipal courts. The part played by the latter as a source of International Law in the international sphere results from the fact that municipal courts are organs of the State. Their decisions within any particular State when endowed with sufficient uniformity and authority may be regarded as expressing the *opinio juris* of that State. When, further, a point of International Law is covered by a series of concordant and authoritative decisions of municipal courts of various States, such decisions may be properly regarded as evidence of International custom. In that sense, these decisions are not merely a subsidiary means for determining rules of International Law in the sense of Article 38 (4) but also evidence of general practice accepted as law in the meaning of Article 38 (2) of the Statute."[2]

1. 9 Cranch 191, 198,
2. Lauterpacht : The Development of International Law by the International Court p. 20.

7. The Doctrine of Judical Precedents in International Law. The common law doctrine of judicial precedents has no place in International Law and prior decisions of the international courts have no binding force. Article 59 of the Statute of the International Court of Justice expressly lays down that "the decision of the Court has no binding force except between the parties and in respect of that particular case." Similar was the rule with regard to the decisions of the Permanent Court of International Justice. The practice of the Permanent Court was to use its prior decisions for guidance only. Article 38 of the Statute of the new Court requires the Court in administering International Law to apply judicial decisions as "subsidiary means for the determination of rules of law." Taking both these articles of the Statute together it appears that while the Court is not bound to follow its prior decisions it can use them for the purpose of extracting or deducing a rule of law if the circumstances of the case allow.

Theoretically the position is that the rule of *stare decisis* is unknown to International Law and an International Court will be fully justified in not following the previous decisions The law in this regard was summed up by the Anglo German Mixed Arbitral Tribunal in the case of *Gunn* v. *Gunn*, thus:

> "Considering the nature of their task and their position as a final Arbitral Court created by the Peace Treaty, a decision given by them in a case cannot be deemed as unreservedly binding for future cases. They must reserve to themselves the right of reconsidering in a new case a legal question dealt with by them in a former decison."

All that Article 59 of the Statute lays down is that the decisions of the International Courts have no binding force except between the parties and in respect of that particular case. It does not preclude the court dealing with a matter from looking into a previous decision for finding out the correct rule that may be applied to the case in hand.

In practice however, the previously decided cases have been referred to in arguments, noticed and relied upon by the Court. The Permanent Court of International Justice on several occasions relied upon previously decided cases. In the famous *Lotus case* a number of decisions were cited but the court did not feel disposed to rely upon them in the absence of a decision of an International Tribunal for it observed : "So far as this Court is aware there are no decisions of international tribunals

in this matter, but some decisions of municipal courts have been cited." The Court however in disposing of the argument of the French Government to the effect that the meaning of the expression 'principles of International Law' in Art. 15 of the Convention of Lausanne of July 24, 1923 shhuld be sought in the light of the evolution of the Convention seems to have relied upon some of its previous judgments for it said: "The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a Convention is sufficiently clear in itself."

In the *Chorzow Factory case* (1927)[1] the Court relied upon its previous judgment in the case of German interests in *Polish Upper Silesia* (1925).[2] The Court in the case of the *European Commission of the Danube* (1927)[3] relied upon its previous decisions which it referred thus :

"As the Court has had occasion to state in its previous judgments and opinions, restrictions on the exercise of soveriegn rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty." In its Advisory opinion on the Greco-Turkish Agreement of December 1, 1926 the Court expressly stated that it was following "the precedent afforded by its Advisory opinion No. 3. Further, in the case of the German Interests in *Polish Upper Silesia* (*Merits*) the Court observed :

"Nothing has been advanced in the course of the present proceedings calculated to alter the court's opinion (as expressed in Advisory opinion no. 6) on this point."

The Permanent Court of International Justice did not only rely upon its previous decisions as stated but also on many an occasion advanced reasons for not adhering to its view in earlier cases. There being no obligation on the Court to follow its previous decisions, it was not necessary for it to have given reasons for departure from the rule previously laid down. The fact that it felt bound to advance reasons for not adopting the view previously held by it shows that it attaches importance to the earlier decisions. In the case of the *Serbian and Brazilian Loans* (1929)[4] the Court in defining the task entrusted to it by the special Agreement observed :

"This is made necessary because of the fact that the

1. P. C. I. J. (1928) Series A, No. 17.
2. P. C. I. J. (1926) Series A, No. 7.
3. P. C. I. J. (1927) Series B, No. 14.
4. P. C. I. J. (1928) Series A, Nos. 20 and 21.

jurisdiction which the Court is called upon to exercise under the Agreement between France and the Serb-Croat-Slovene State seems at first sight to constitute a departure from the principles which the court in previous judgments had laid down with regard to the conditions under which a State may bring before it cases relating to the private rights of its nationals."

In yet another case, namely, one relating to the *Mavrommatis Palestine Concessions*[1] the Court declared that the method adopted by it in the case was different from that apparent in its Advisory opinion regarding the *Tunis* and *Morocco Nationality Decrees*. These cases are illustrative of the attitude of the Court towards its previous decisions and it would not be improper to conclude that in practice the Permanent Court of International Justice had great regard of its earlier decisions.

The International Court of Justice follows the same practice and though by reason of Article 59 of its Statute it is not bound to follow its previous decisions or the decisions of the Permanent Court of International Justice it relies upon them whenever it considers proper. The Court in the case of the *United States Nationals in Morocco* (1952) relied upon its opinion given on the interpretation of Peace Treaties (Second phase) in affirmation of the rule that it is a duty of the Court to interpret treaties not to revise them. In the same case it relied upon the *Asylum case*, and the *Freezone case*. In tendering its Advisory opinion on Awards of the United Nations Administrative Tribunals the Court adopted the view taken by it in its earlier opinion relating to the Reparation for injuries suffered in the service of the United Nations.

The International Court of Justice has also followed what it terms as the jurisprudence of the Permanent Court. In the *Corfu Channel (Merits) case*[2] (1953) the Court supported its view with reference to the decisions of the Permanent Court. In the Ambatielos the Court observed that it 'was not departing from the principle which is well established in International Law and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice to the effect that a State may not be compelled to submit its disputes to arbitration without its consent." In its Advisory opinion concerning conditions for Admission of a State to Membership in the United Nations the Court observed: "Consequently,

1. P. C. I. J. (1924) Series A, No. 2.
2. I. C. J. Reports 1949 p. 4.

it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice."

The above cases show the practice of the International Court of Justice in relying upon the earlier decisions given by the Permanent Court and by itself. According to *Lauterpacht* the position is: "It is not suggested that in pursuing the practice of relying upon and following its previous decisions the Court has adopted the common law doctrine of judicial precedent. The Court has not committed itself to the view that it is bound to follow its previous decisions even in cases in which it later disagrees with them. It may be a matter of controversy how far in countries in which courts are bound by judicial precedent they do in fact respect decisions of tribunals of co-ordinate or higher jurisdiction with which they happen to disagree; but there is no doubt as to the existence of the legal duty obliging them to do so. No such duty hampers the discretion of the International Court. However, while not fettered by the rigidity of the formal doctrine of precedent, it has, as shown, largely adopted its substance."[1]

D. WORKS OF JURISTS AND COMMENTATORS

The opinion of Jurists and Commentators on matters of International Law contained in their works has no small influence on the development of law. The statute of the International Court of Justice recognises 'the teachings of the most highly qualified publicists of the various nations as the subsidiary means for the determination of the rules of law.'

Juristic works are evidences of the law. "Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is."[2] The importance of the juristic works lies in the fact that they furnish evidence of custom and usage and deduce rules of law from the materials noticed by them. A consensus of opinion among jurists on a matter is of very great value and may be conclusive. "No civilised nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on International Law.[3]" Even on abstract principles of law the opinion of the Jurists is entitled to weight because of its persuasive value.

1. Lauterpacht : The Development of International Law by the International Court, P. 13-14.
2. The Paqucte Habana (1900) 175 U. S. 677 per Gray J. at P. 700.
3. Kent : International Law (2nd Eng. Ed.) p. 37.

In the case of the *West Rand Central Gold Mining Co., Ltd.*, Lord Alverstone C. J. speaking of this source of law observed :

> "The views expressed by learned writers on International law have done in the past and will do in the future valuable service in helping to create the opinion by which the range of the consensus of civilised nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, law".[1] Lord Sumner in the *Krouprinsessan Margareta* (1921) observed that 'valuable as the opinions of learned and distinguished writers must always be, as aids to a full and exact comprehension of a systematic law of nations, Prize Courts must always attach chief importance to the current of decisions and the more the field is covered by decided cases the less becomes the authority of commentators and jurists."[1]

It will thus appear from the cases noted above that the importance of the works of jurists and commentators does not only lie in furnishing evidence of what the law is but in putting forward their case as to what the law ought to be. Their views as to what the law ought to be have the tendency of moulding the opinions of the nations resulting ultimately in modification or alteration of the law. By reason of their high learning and accurate observation of the international events the jurists and commentators are fully qualified to speak with authority on legal questions and their views are entitled to great respect, even though they may follow a particular ideology. Even their personal views based on reasons are likely to influence legal thought of the nations.

E. THE GENERAL PRINCIPLES OF LAW RECOGNISED BY CIVILIZED NATIONS

1. General Principles as source of Law.—The International Court of Justice has been authorised by the statute to apply the general principles of law recognised by civilized nations in order to arrive at a decision in a case submitted to it. The intention of the statute appears to be that the princi-

1. (1905) 2 K. B. 391.

ples of private or municipal law in so far as they are applicable to international problems may be used by the Court. The statute in making this provision discards the Positivist's theory according to which treaties and customs were the only sources of law. It supports the view that principles of natural law which cannot but be recognised by all civilized nations, still constitute a valuable source of law.

Even before the present Statute the general principles of law were invoked by one party or the other in cases before International Courts. The Permanent Court of International Justice applied the rule of *res judicata* in the *Chor Zow Factory* case,[1] and the general principles of subrogation in the case of the diversion of water from the Meuse[2].

It appears that the Statute expressly recognises that the practice of referring to and invoking general principles of law was wholesome.

Moreover there is no reason why the general principles of morality, equity and justice which apply to individuals should not be applicable to States in their mutual relations, The provisions of the statute in making general principles of law applicable to international problems widens the sphere of the development of International Law and to render it possible for the principles of natural law to further develop the science of International Law.

2. **Application of General Principles of Law.**—The International Court of Justice by reason of the provisions of Article 38 of its Statute is free to apply general principles of law recognised by civilised nations. The expression 'General principles of law recognised by civilised nations' has not been defined but has been left to be interpreted by the Court. It is the duty of the Court to first find out whether the general principle of law contended for is one which has received recognition of civilized nations and then to apply it. This provision has the effect of widening the scope of authority of the Court and enabling it to inroduce new principles in International Law. The Article further empowers the Court to apply universally recognised general principles of municipal law to international disputes. The statute of the International Court of Justice by authorising the Court to apply general principles of law has made the development of law by the Court possible. Such a provision was present also in the statute of Permanent Court of International Justice and

1. Pub P C. I. J. (1928) Series A. No. 17, P.·29.
2. Pub. P. C. I. J. (1924) Series A. No. 2, P. 28.

that Court made use, though not a full use of it in developing the law. It may however, be noted that the Article does not furnish a new method of development of law but merely gives statutory recognition to an old method by which the development of International Law was achieved in the past, for universally recognised general principles of law had an uncanny habit of finding their way always into International Law. *Brierly* also observes: "The paragraph then introduces no novelty into the system, for general principles of law are a source to which International Courts have instinctively and properly referred in the past"[1]

There has, however, been no frequent use of the general principles of law by the Courts which have been very cautious in resorting to this method. *Schwarzenberger*, observes: "In its jurisprudence, the Permanent Court of International Justice made spare use of the authority conferred on it by its statute to apply the general principles of law recognised by civilised nations."[2] To what use these general principles of law have been put will appear from some of the cases dealt with by the Court. In the case of *German* Interests in Upper *Silesia* (1925) the Court referred to the general principles of law as permitting it to decide the question of jurisdiction before entering into the merits of the case, for it said that "nothing either in the statute or rules which govern the Court's activities, or in the general principles of law, prevents the Court from dealing with it at once, and before entering upon the merits of the case." The Court in *Chorzow Factory Case* (1927) relied upon what is considered to be a generally accepted principle when it observed: "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration as well as by municipal courts that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has by some illegal act prevented the latter from fulfilling some obligation in question or from having recourse to the tribunal which would have been open to him." In the same case the court said that "it is a principle of International Law and even a general conception of law that every breach of an engagement involves an obligation to make reparation. The Court in its Advisory Opinion on the Greco-Turkish Agreement of December 1, 1926 refuted the argument that individual members of the Mixed Commissioner could individually take action on behalf of the Commission by saying: " To accord

1. Brierly: The Law of Nations p. 64.
2. Schwarzenberger: International Law Vol. I p. 15.

to individual members of an organisation constituted as a corporate body any right to take action of any kind outside the sphere of proceedings within that organisation, would be clearly contrary to an accepted principle of law."

The International Court of Justice in the *Corfu Channel* (*Merits*) case of 1949 held that Albania was under an obligation to notify the existence of the minefield in its territorial waters and to warn the approaching British Warships of the imminent danger to which the minefield exposed them. The Court observed: "Such obligations are based, not on the Hague Convention of 1907, No. VIII which is applicable in times of war, but on certain general and well recognised principles namely, elementary consideration of humanity even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States." Again in its Advisory opinion on the Effect of Awards of the United Nations Administrative Tribunal, the International Court applied the principle of *res judicata* which it affirmed to be a "well-established and generally recognised principle of law."

The Arbitral Tribunals have also not lagged behind in respect of this method of approach to a case. They have also made use of general principles of law whenever they considered it proper. For example, the special Arbitral Tribunal between Germany and Portugal in the *Mazina* and *Naulilaa* cases (1928) after referring to other sources of law observed: "Finally, in the absence of rules of International Law which are applicable to the facts in dispute, the arbitrators are of opinion that it is their duty to fill the gap by applying principles of equity, fully taking into account the spirit of International Law, which is applied by way of analogy and its evolution."

3. Judicial Legislation through General Principles of Law.—The Courts in applying general principles of law tend to introduce new principles into the system of law, they are called upon to administer. As already stated the international courts in exercise of their judicial functions developed the law by introducing well recognised principles of private or municipal law into the system of International Law. International Law is yet incomplete in the sense that the existing rules of International Law cannot solve all international problems. The courts which are charged with the duty of deciding a case have of necessity to rely upon 'general principles of law recognised by civilised nations,' when the case before them is not governed by an existing rule of International Law. When they adopt

this method and apply general principles of law to the matter in controversy before them, they in effect legislate by laying down a new rule for incorporation into the existing law. There are many instances of such judicial legislation. Both legal and equitable principles introduced in this way have come to stay and have become integral part of the system of International Law. The application of general principles of law by the International Courts has resulted in incorporation of the following recognised legal principles into International Law :—

a. **The principles of equity and good faith.**—Equitable principles by reason of the influence of national law have found their way imperceptibly into International Law. Rules of equity and good faith are at present as much a part of International Law as of municipal law. International Courts and Tribunals insist upon good faith and apply equitable principles in doing justice between nations. The Permanent Court of Arbitration in the case of the *Preferential Rights claimed by the Blockading Powers from Venezuela* (1904) laid emphasis upon the rule of good faith and laid down that good faith "ought to govern international relations" Again in the case of the *Boundary between the Netherlands and Portugal on the Island of Timor* (1914) the Court declared that equitable view was not to be lost sight of in dealing with international relations The Court had occasion to interpret the expression 'absolute equity' in the case of the *Orinoco Steamship Company* (1910) and it took the view that in deciding the matter in accordance with 'absolute equity it could not permit technical objections to hamper the cause of justice.

b. **Clausula Rebus Sic Stantibus.**—This doctrine means that a treaty is intended by the parties to be binding only as long as there is no vital change in the circumstances assumed by the parties at the time of the conclusion of the treaty. This principle has a place in nearly all important systems of law and is known by different names in different systems. This doctrine is known in English and American systems of law as the doctrine of Frustration of Contract.' The law of Germany knows the rule of avoidance of a contract on the ground of impossibility of performance and the rules of revaluation of obligations. It finds place in the French and Italian systems of law as the doctrine of Revision of Contracts on the ground of changed circumstances.

This principle is frequently invoked when the case involves a breach of treaty obligations. Divergent are the views with regard to the application of this doctrine in International Law.

Starke observes thus : "The *rebus sic stantibus* doctrine is one of the enigmas of International Law. Its exact scope and application are uncertain, practice is inconsistent, and International Tribunals fight shy of committing themselves to pronouncements or decisions involving them."[1]

The Permanent Court of International Justice dealt with this doctrine at length in the *Free Zones* case (1932). The Court took the view that a change in original state of facts brings about the termination of treaty obligations if the treaty is proved to have been entered into with preference to the state of circumstances then existing and if there was an understanding as to the continuance of these circumstances. In this case the French Government pleaded that the Treaties terminated on account of vital changes of the circumstances. The Court examined the entire facts and came to the conclusion that since 1815 important changes had taken place but it held that these changes were not so material as to terminate treaty obligations. The court recognised the applicability of this principle but refrained from examining its full scope.

Although the doctrine has been received into the system of International Law, it has not so far proved to be of great utility because of its undefined scope.

c. The Rule of Estoppel.—This rule is in constant use before the International Courts and Tribunals. It it often grounded on considerations of good faith. This rule had to struggle hard before it was accepted in International Jurisprudence. The rule of estoppel as a purely technical rule of evidence was long considered to be unsuited to the 'rough jurisprudence of nations'. The Judicial Committee of the Privy Council in the case of *Canada and Dominion Sugar Company Ltd* v. *Canadian National (West Indies) Steamships Ltd.*[2] laid down : "Estoppel is often described as a rule of evidence, as, indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law."

The International Courts and Tribunals have in many a case relied upon the rule of estoppel. This principle has been invoked by the States in their diplomatic correspondence since about the beginning of this century. The growth of this rule as a part of International Law was rather slow. But it has now taken firm root and is in evidence in its various aspects. How this rule is applied in cases of international disputes will appear from the few cases noticed here.

1. J. G. Starke : An Introduction to International Law p. 325.
2. (1947) A. C. 46.

The Arbitral Tribunal in the *Tinoco Arbitration* Case (1923) between Great Britain and Costa Rica took into consideration the municipal law doctrine of estoppel which was stated thus : "An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him." The Tribunal having stated the law held that no case for the application of the doctrine was made out. The Permanent Court of International Justice in the *Chorzow Factory* case held that "one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the Tribunal which would have been open to him." In the case of *Eastern Greenland* the Court held that as Norway recognised the whole Greenland as Danish : "She debarred herself from contesting Danish sovereignty over the whole of Greenland." The principle of estoppel featured in the jurisprudence of the Permanent Court of International Justice in the case of the *Serbiam* and *Brazilian Loans* and in the Advisory opinion concerning the jurisdiction of the European Commission of the Danube. The International Court of Justice in the *Nottebohm* case laid down the rule that a State cannot be heard to put forward a contention which is inconsistent with its previous attitude.

d. The principle of Res Judicata.—The principle of finality of a judgment prevails in International Law as in municipal law. A judgment of International Court is, subject to the provisions relating to their interpretation and revision is final and is binding on the parties. This rule of finality also applies to awards by the arbitrators.

The principle of *res judicata* was invoked and applied in a number of cases in some of which it was held to be a settled rule of International Law. The Permanent Court of International Justice in the case of the *Polish Postal Service in Danzig* (1925) declared that the finality of awards constitutes a principle of International Arbitration. In the *Trail Smelter* case the International Court of Justice declared that the principle of the sanctity of *res judicata* formed an essential and settled rule of International Law.

e. The doctrine of abuse of rights.—This doctrine is a challenge to individualism and in private law is calculated to limit the exercise of private rights in the interest of the

Society. In International Law it arises out of the application of the general principles of law. *Lauterpacht* in speaking about this doctrine observes : "Another instance of judicial legislation by way of an application of a general principle of law is the manner in which the Court, in resorting to the doctrine of abuse of rights lent its authority to the creation of a new source of international responsibility. Prior to its appearance in the judgments and opinions of the Court, the substance of the doctrine of abuse of rights had been recognised by a number of writers and in some arbitral decisions."[1]

Modern society cannot permit the exercise of private rights to its detriment and the activity of the courts is required to check such abuse of rights. In modern systems of private law the doctrine is present in some form or other. It is an elastic principle and can be utilised to undermine private rights for the good of the society. In International Law the use of this doctrine is likely to be beneficial to the society of nations. The Permanent Court of International Justice made use of this doctrine in the case concerning certain *German interests* in *Polish Upper Silesia* when it considered the right of Germany to dispose of State property of Upper Silesia after laying down the rule that Germany would be guilty of the breach of International obligations only if it was proved that there was misuse of rights on her part The Court on a finding that there was no misuse of rights on the part of Germany held that her act of disposal of public property was within the limits of her normal administration of property. In the *Free Zones* case (1930) the Court referred to the doctrine of the abuse of rights but refused to presume an abuse.

The various aspects of this doctrine have not so far been examined by the International Court but it can safely be expected that it will, in course of time, find wide and varied application in international disputes. There is yet some hesitation in applying this doctrine in international sphere as observed by judge *Anzilotti* in the case of the *Electricity Company of Sofia* (1939) who said : "The theory of abuse of rights is an extremely delicate one and I should hesitate long before applying it to such a question as the compulsory jurisdiction of the Court." But judge *Lauterpacht* is hopeful for he observes : "These are but modest beginnings of a doctrine which is full of potentialities and which places a considerable power,

1. Lauterpacht: The Development of International Law by the International Court p. 162.

not devoid of a legislative character, in the hands of a Judicial Tribunal."[1]

f. The principle of unjust enrichment.—This is essentially a rule derived from national law and nearly all systems of private law have adopted it. The principle prohibits a person from enriching himself at the cost of another. It is an extension of the principle of good faith. It has been introduced into International Law by International Tribunals. The Anglo-German Mixed Tribunals applied this doctrine in a number of cases.

International Comity.—The term 'International Comity' may be defined as rules of conduct required to be observed in inter-State relations on the ground of courtesy *i e.* politeness, convenience and goodwill These rules of conduct on the ground of courtesy do not constitute customary rules of International Law and are not sources of law. They are observed by the States not because they are obligatory rules of International Customary Law but because they embody expressions of goodwill which is desirable in mutual relations of the States. The breach of a rule of 'comity' does not amount to any breach of International Law.

CHAPTER III

HISTORY OF INTERNATIONAL LAW

History of International Law.—Although modern International Law developed during the last four centuries, its history can be traced from the time when human beings took to corporate living and began to group themselves into small communities. The existence of these communities within narrow geographical areas and some form of contact among them must mark the beginning of International Law. History speaks of treaties between Egyptian Pharoahs and neighbouring kings and of those between Hebrew kings and their neighbours.

Jews.—The ancient Jews by reason of their religious ideology which prevented them from treating other nations as their equal had dealings only with few foreign nations. Their rules provided for the observance of treaties and respect for the ambassadors of friendly powers. But with every nation the Jews waged ruthless wars and no moral rule or law was strong enough to check them in their cruelty.

1. Lauterpacht: The Development of International Law by the International Court p. 164.

Hindu India.—Some rules coming within the scope of International Law were known to Hindu ancient India. *Dharma* as enunciated in sacred books by ancient sages was the guiding principle of Hindu kings both in their relations with their subjects and with other kings. This *Dharma*, the eternal law of right and wrong governed all human activities and was the touchstone on which every act, both of a subject and a king were tested. Ancient Hindu kings had an idea of just and unjust wars. Wars were waged for various reasons. Selfglory and vindication of honour besides acquisition of more territories were the frequent causes of war.

The epics of Ramayan and Mahabharat bear testimony to the fact that there were laws of war as well as of peace and that these laws were based on *Dharma*. The *Arthashastra* of *Kautilya* and the *Nitishastra* of *Kamandaka* stand out as great works formulating rules for guidance of kings in their governmental and foreign affairs. *Kautilya* was perhaps the first who maintained that there was no room for the application of Dharma or principles of morality to the exigencies of war. He was in favour of adoption of all means whether fair or foul during war. He had the outlook of an astute statesman.

Manu, the ancient law-giver recognised the inherent right of a king to wage war and declared that a Kshatriya was bound in duty to take part in a just war. He denounced perfidy in warfare and prohibited the use of poisoned or barbed weapons. It was forbidden to kill or wound enemy persons who had surrendered. Temples were inviolable and prisoners of war and non-combatants enjoyed immunity. Envoys were respected and held sacred. The intercourse with other States was mainly through the instrumentality of envoys. Hindu states entered into treaties with each other and they had great respect for these treaties.

Mohammedans.—Muslim Jurisprudence did not, as a matter of fact, contain rules which may properly fall within the sphere of International Law. "What approaches nearest to International Law in this system is the law defining the relations of the Muslim State and of the Muslims towards non-Muslim State and the non-Muslims. But the rules under this department of law bind only the Muslim State and Muslims, and are not based on any international arrangement or comity."[1]

The Muslim State for protection of Islam had a right to wage war against an alien or hostile non-Muslim State. This

1. Abdur Rahim—The Principles of Mohammedan Jurisprudence 65.

war was known as *Jehad*. *Jehad* was only waged on the refusal of the non-Muslim subjects of the hostile State to accept Islam. No war was to be waged if they signified their willingness to accept Islam.

Muslim Jurisprudence maintained a distinction between combatants and non-combatants. Women, children, the aged and the diseased enjoyed safety during a *jehad*. Prisoners of war were either killed or enslaved at the discretion of the Victor. The head of a Muslim State was free to conclude treaties with non-Muslim States. Treaties were respected.

Greeks.—The beginning in formulating rules of conduct for the States was made by the Greeks at a time when a number of city-States having common race, language, religion and customs sprang up and the need for some rules of guidance with regard to their mutual relations was keenly felt. There was a real community of interests among these city-states and this was enough to bring into existence some form of International Law. Greek philosophers conceived the idea of a 'higher law' or 'natural law'—the true universal rule of right or wrong. This natural law helped them in making rules to govern the States in their mutual dealings. The following will give an idea of the International Law of the Greeks:—

(*a*) War could not be commenced without a previous declaration of war.

(*b*) Prisoners of war could be made slaves; they could be exchanged or let off on payment of ransom.

(*c*) The inhabitants of the captured city taking refuge in a temple could not be killed.

(*d*) Heralds, Priests and holy seers in the army of the enemy were inviolable.

(*e*) Inter-State disputes could be referred to arbitration. Many treaties contained an arbitration clause.

(*f*) Treaties were to be entered and respected.

(*g*) Ambassadors enjoyed special privileges. They were ceremoniously received; their persons were inviolable.

The rules of war and of peace of the Greeks could not prevent wars and establish peace among the States.

Romans.—The contribution of the Romans in the development of International Law was more valuable. It was during the period when Rome was a city-state among other States and the Romans maintained relations with foreign States that

elaborate rules of International Law came into existence. The Romans had twenty fetiales who were in charge of their foreign affairs. These fetiales were employed when war or peace was made, when treaties were entered into and when there arose some inter-State disputes of any kind.

The *jus gentium* of the Romans which was originally a law applicable to foreigners coming to Rome in course of time by its association with *jus naturale* of the Greeks developed into a system of law governing international relations. The *jus naturale* served as a model to the Romans and it was referred to in matters where *jus gentium* was silent. Important features of their system of International Law were :—

(*a*) Wars were of two categories *viz*, just wars and unjust wars. Just wars were those which were waged (1) for violation of Roman territory (2) for violation of ambassadors (3) for violation of treaties and (4) for an unfriendly act *e.g.*, help given to an enemy by a friendly State. These just wars were permitted only when the offending State failed to make amends for the wrong done on being asked to do so. Four fetiales were commissioned to go and demand satisfaction. In case satisfaction was refused one of the fetiales threw a lance from Roman frontier to the foreign land and this meant a formal declaration of war.

(*b*) Although no regular rules existed about the manner of warfare, Romans had rules governing the close of warfare. Wars could be ended by (1) a treaty of friendship (2) surrender and (3) conquest. In case of surrender property and lives of the enemy surrendering stood saved, while on conquest, the Romans were free to deal with property and lives in any manner they liked.

(*c*) Ambassadors enjoyed full protection.

(*d*) Treaties were of three kinds *viz*. (1) Treaty of friendship (2) Treaty of alliance and (3) Treaty of hospitality. A treaty was capable of being terminated by notice. But so long as it remained in force, it was respected. A treaty of friendship between Romans and a foreign State gave protection to the citizens and property of the foreign State coming into Roman territory. In the absence of a treaty, no protection was given either to the goods or the

persons of foreign States. Persons could be captured and enslaved.

The establishment of the Roman Empire could hardly mark any progress in International Law because all the States with which dealings were possible in those days had come under the sway of the Romans. Nations living on the border of the Empire were continuously at war with the Roman; and thus there was very little room for the development of law.

When the Roman Empire crumbled to pieces a number of nations set up their own States. As these peoples who professed Christian religion were uncivilized, they had no idea of a community of interests with the result that no progress in the development of system of law was possible. Then followed centuries of anarchy which saw rise and fall of many a nations and empires. During this period Christian teachings exercised an influence on legal ideology, but the political situation was not favourable for the advancement of the science of International Law.

Sixteenth Century.—The beginning of the sixteenth century saw a number of independent States spreading all over Europe. This was the proper time for progress in the development of International Law. At this time the following factors contributed to the growth of the principles of International Law :—

1. The existence of a number of independent States led jurists to formulate rules regulating the conduct of States in their mutual dealings. These jurists discussed many questions of International Law either in the light of the principles laid down by the Roman Law or with reference to common law or to the law of nature. Their writings made important contributions to the growth of International Law which was yet in its infancy. Well-known jurists who produced works on International Law were Vitoria, an Italian ; Brunis, a German ; Suarez, a Spanish, Jesuit and Gentilis, an Italian Professor at Oxford.

2. An important body of maritime rules necessitated by the growth of sea-borne trade developed during this period. These rules were based on maritime customs regarding the rights and duties of merchants and ship-owners of different countries in their dealings with one another. Important questions regarding freedom of high seas engaged the minds of jurists.

3. By the end of the fifteenth century Europeon powers began keeping standing armies. This practice was bound to result in uniform rules of warfare.

4. States had begun the practice of establishing permanent legations. The exchange of diplomatic envoys led to solution of problems of common interests.

5. The most important factor was the Renaissance and the Reformation. The Renaissance brought with it new philosophic, literary and scientific ideas. The Reformation put an end to the supremacy of the Pope. The Renaissance and the Reformation gave rise to an idea of independence of States and led to the growth of inter-State intercourse.

6. A genuine anxiety on the part of the States for establishment of trade relations among themselves stimulated a desire to put an end to international lawlessness and to build up a complete system of International Law.

This century saw a number of philosophers engaged in the study of international problems. These writers may be called the Fore-runners of *Grotius* in the sense that they tried to build up a system of International Law. The most important among these writers was *Gentilis* an Italian jurist whose contribution to the science of International Law was commendable. His first book, *De Legationibus* was published in 1588. This was followed by his *Commentationes de Jure Belli*. According to *Holland* 'the first step towards making International Law, what it is, was taken, not by Grotius, but by Gentilis'. It was his theory which paved the way for Grotius to systematise the law and to earn the title of 'Father of International Law.'

Seventeenth and Eighteenth Century.—During the Seventeenth Century important events took place and influenced the growth of the principles of International Law. The Thirty Years War culminating in the Peace of Westphalia marked the beginning of a new era in international relations. The two treaties of the Peace of Westphalia set up a balance of power with a view to prevent any one State dominating other States in future. The contracting parties undertook to defend collectively violations against the terms of the Peace of Westphalia. This was the beginning of unity among States.

Grotius :—Before the Peace of Westphalia, had been published, *De Jure Belli ac Pacis* the famous book of Grotius on International Law. This work appeared in 1625 and

won for its author abundant praise and an ever-lasting fame. In his search for the rules of International Law Grotius made natural law the basis of his system. But in doing so he did not ignore what he termed 'a voluntary law' based on consent either express in the form of treaties or implied in the form of customs and usages. To him natural law is 'the dictate of right reason which points out that a given act, because of its opposition to or conformity with man's rational nature is either morally wrong or morally necessary and accordingly forbidden or commanded by God, the author of nature.' Grotius tested the validity of his rules on the touchstone provided by Law of Nature. The voluntary law was thus subordinated to the Law of Nature. In case of conflict between natural law and voluntary law, the former was to prevail. This work of Grotius produced such an impression all over Europe that it became a valuable guide to nations in international matters.

Zouche.—The famous work of Grotius was followed by an important book on International Law written by an English Jurist, Richard Zouche. He did not agree with Grotius in giving natural law a preference over the 'voluntary law.' He emphasised the importance of customary International Law without denying the existence of natural law.

Three Schools.—The difference in the theories of Grotius and those of Zouche raised a huge controversy and three schools of thought, *viz.* The Naturalists, the Positivists and the Grotians, came into existence. The Naturalists headed by Pufendorf maintained that International Law was but a part of natural law and that no positive International Law could be derived from treaties or customs. Pufendorf denied that in international conduct custom and treaty were the determining factors and maintained that rules of international conduct were evolved out of natural law as evidenced by the application of reason to international relations.

The Positivist School—The leader of this School *Bynkershoek,* a Dutch Jurist did not consider natural law as of any importance but regarded customary law based on treaties and customs to be positive International Law and of highest importance. This school maintained that usage and custom was the embodiment of collective reason of generations and therefore the real source of International Law. Another great exponent of this school was *John Jacob Moser,* a German writer who

collected treaties and usages on subjects of International Law. The third writer of importance of this school was George *Friedrich de Martens* whose book *'Precis de droit des gens moderne del' Europe'* was published in 1789 on the eve of the French Revolution and greatly influenced the political thought of nations.

The Grotian School—It took a middle course and differed from Grotius in his conception of the natural law and in his conclusions. *Vattel*, one of the great exponents of this school published his famous work entitled *'Le Droit des Gens'* in 1758. *Vattel* was not in favour of applying natural law in its bald form to the inter-State relations. He conceded that States in the application of natural law to international relations were entitled to use a certain discretion. The application of natural law in its modified form to international relations was the voluntary law. Vattel also recognised 'conventional law' in the form of treaties and 'customary law' based on usages.

The Eighteenth Century saw the victory of the Positivist school of International Law. The French Revolution brought with it new ideals of democracy and the growth of nationalism and stimulated the growth of International Law.

Nineteenth Century.—Following the fall of Napoleon came the Congress of Vienna which assumed the role of a law making body. The balance of power which had been shaken by the French Revolution was restored The formation of Holy Alliance in Europe with the avowed object of creating a personal union of princes paved the way for the application of Christian morality to international relations. By reason of the Quadruple Alliance of 1815 Russia, Prussia, Austria and Great Britain undertook ' to hold periodical meetings for the consideration of important common interests and to concert measures for the peace and welfare of the peoples' .....At the Congress of Aixl-a-Chapelle in 1818 these four powers together with France which had acceded pledged themselves to act in their international dealings according to the rules of International Law. In 1820 Russia, Prussia and Austria meeting at the Congress of Troppau declared a policy of armed intervention for the sake of peace and security of nations. As a result of this policy several interventions were made without any protest These interventions were a direct challenge to the ideas of independence and equality of States. The intervention in war between Spain and America evoked a protest from America in the

shape of the famous Munroe Doctrine of 1823. This was a period in which frantic efforts were made for the maintenance of balance of power. A number of alliances between States came into existence and a practice of States meeting at conferences and congresses for the promotion of common interests came into vogue. A community of nations was thus shaped and problems of international interests engaged the attention of statesmen and politicians. A spirit of co-operation in the larger interests of humanity made itself evident.

Hague Conferences.—In 1899 the Peace Conferences at Hague marked the beginning of a real effort to make a clarification and enunciation of the rules binding on States in international relations by common consent. The convention for the Pacific Settlement of international disputes recognised arbitration as the most effective means of settling international disputes. Here arose a desire to stop future wars and to maintain peace among States. At the First Hague Conference a code of rules with respect to warfare on land was adopted.

The Second Hague Conference of 1907 interested itself more with the rules relating to warfare than with other subjects. Conventions dealing with bombardment, the laying of contact mines, rights and duties of neutrals in naval warfare, conversion of merchant ships into war-ships, maritime warfare and other allied subjects were adopted. The Hague Conferences could not bring about an organization of International Community for the maintenance of peace and did not evolve out a principle of collective responsibility of States in the interest of world tranquility. Nothing was, therefore, done to prevent recurrence of war which was accepted as lawful.

Eminent Writers.—The Positivist School retained its predominance in the nineteenth century. International Law formed a favourite subject of study for a number of eminent jurists of this period and a number of valuable works were published. In 1839 *Manning* published his 'Commentaries on the Law of Nations.' *Phillimore's* famous 'Commentaries op International Law' were published in 1854. Another important author who contributed to the development of the science of International Law during this period was *Hall*, whose book on International Law was published in 1880. *Walker*, published his 'Science of International Law' in 1893. The two great writers who brought out their works on

International Law about the beginning of the twentieth century were *Westlake* and *Oppenheim.*

In the United States too, several writers published their works on International Law during the nineteenth century. In 1826 *James Kent* in his 'Commentaries on American Law' gave a systematic exposition of International Law. *Henry Wheaton's* 'Elements of International Law' appeared in 1836 and influenced the legal thought in a great measure. *Francis Lieber's* codification of the laws of war and of the rules with regard to the rights and duties of neutral States was an important event in the progress of legal development.

The continental writers did not lag behind and it is interesting to note that several continental jurists exercised a great influence on the science of International Law *Klubers, Heffter, Bluntschli, Jellinek, Ihering, Triepel* and *Kaufmann* were eminent jurists of that period and their works may be regarded to be indispensable in the study of principles of International Law.

The First World War —International Law found itself deliberately violated during the First World War and humanity lost faith in the binding nature of the rules of International Law. The long standing permanent neutrality of Belgium suffered a ruthless violation at the hands of Germany. The rules of Warfare on land and sea enunciated by the Hague Conference were reduced to mere mockery. All immunities and prohibitions guaranteed by International Law vanished in the whirlwind of horrible warfare, the like of which the world had not so far seen. German necessities of war regarded nothing in International Law to prevent the use of improper means of warfare. The violations of International Law committed during the war did not however retard the progress of the development of International Law. At the conclusion of the war it was keenly felt by the States that in International Law lies the guarantee for world peace. The Treaty of Versailles had an important effect on International Law.

The League of Nations.—The Covenant of the League of Nations may be regarded as representing the keen desire of a world tired of war for an everlasting peace. The principle of balance of power gave place to the doctrine of collective responsibility of the States for the maintenance of peace and order in the society of States. The Covenant provided for an organized community of States and introduced a policy to prevent recurrence of war. It intro-

duced far reaching changes in International Law. The Members of the League undertook to refer inter-State disputes to International Tribunals or the Council. It introduced the use of economic sanctions against States resorting to war in defiance of the Covenant. The Members pledged themselves to supply armed forces for the purpose of protecting the Covenant of the League. The establishment of Permanent Court of International Justice in 1921, provided International Law with an organ competent to interpret it and to elucidate its principles. Although the Covenant did not prohibit war altogether, it had the effect of dsiplacing the old notion of inherent right of warfare. Minutely looked at it would appear that the guarantees provided by the Covenant changed the whole outlook of the nations and the structure of international community.

Locarno Pact (1925).—This came as supplementing the provisions of the Covenant of the League of Nations. This pact contained a Treaty of Mutual Guarantee concluded between Great Britain, Belgium, France, Germany and Italy The contracting parties to this Treaty pledged themselves collectively and severally not to violate the frontiers between Germany and France, between Germany and Belgium, to renounce war and to settle disputes by peaceful means. The Treaty appointed the Council of the League to be the arbiter of the question as to whether there has been a violation of the rule of renunciation of resort to armed forces. Germany in 1936 renounced this Treaty on the ground that the Treaty of Mutual Assistance between France and Soviet-Russia was incompatible with the Locarno Pact.

Kellogg-Briand Pact (1928).—The Treaty for the Renunciation of War popularly known as the Kellogg Briand Pact condemned recourse to war for the settlement of International disputes and made a declaration of renunciation of war as an instrument of national policy of States in their relations with one another. This Pact made it obligatory on the States to adopt peaceful means for the settlement of their disputes.

The Geneva Conference (1929).—At this conference elaborate conventions on the Treatment of Prisoners of War and Amelioration of the condition of the wounded and sick in armies in the field were adopted. The convention on Treatment of Prisoners of War aimed at protecting prisoners from abuses to which they were subjected during the First

World War. It prohibited reprisals, cruel treatment of prisoners and collective penalties for acts of individuals. The other convention for amelioration of the condition of the wounded and sick had for its object a proper care of the wounded and sick on battlefield. It provided for immunities to medical units and persons engaged in the care of the sick and the wounded. It made a provision for exchange of communication between the belligerents about the names of the sick, the wounded and the dead. This Conference made an important contribution to the development of the laws of war and its function was legislative in character.

Period between 1920 and 1939.—The years immediately following the close of the First World War witnessed serious efforts on the parts of statesmen and scholars to place International Law on a firmer basis and to devise means for future world peace. The science of International Law made great progress during this period. The Covenant of the League of Nations became the favourite subject for interpretation with writers and jurists. A huge mass of literature on international problems appeared and encouraged the study of International Law. Important works on International Law were published by eminent writers both on the continent and in the United States. *Hyde* and *Stowell* in America brought out their books containing an analysis of the principles of International Law. The great works of *Hall*, *Wheaton* and *Oppenheim* were revised in the light of new developments. *Anzilotte*, *Strupp*, *Le Fur* and other jurists on the continent enunciated important principles of International Law in their works. *Roscoe Pound* in the United States applied his theory of law as having a social function to international problems. The Vienna School with its great exponent, *Kelsen* had an important influence on International Law. *Kelsen* developed a theory of pure science of law, and asserted that international legal order was composed of norms created by custom and norms created by treaties. Custom was regarded by him to be the older and the original source of International Law. He recognised the primacy of International Law and the subordination of the State to the international legal order.

Multipartite Treaties.—Apart from contributions made by jurists and writers of this period to the development of law, the conclusion of a number of multi-partite treaties of law-making nature had the effect of producing a body of rules of International Law for the promotion of common interests. The Conventions arrived at under the *auspices* of the Health and

Labour Organisations of the League of Nations were many and very useful.

Condification.—The League of Nations took up the question of the codification of International Law and a Committee of experts was also appointed for that purpose. No great success was however achieved in this direction. Several private associations such as the Institute of International Law carried on the work of codification independently of the League. The result of their efforts was that elaborate codes of International Law came into existence. Their contribution to the development of International Law cannot be overlooked. The work of codification has now been taken up by the United Nations.

The Second World War.—The outbreak of the Second World War was a rude awakening to a world lulled into sleep under the protection of the Kellogg-Briand Pact and the League of Nations. International Law appeared to have again vanished. The Nazi tyranny acknowledged no law and the violations of the First World War were repeated with greater force. The Nazi violations of International Law stimulated a keen desire on the part of statesmen and scholars to find out ways and means for the promotion of international peace and security. The Atlantic Charter of 1941 laid down principles of future peace and security.

The Dumbarton Oaks Conference brought out proposals for the establishment of a World Organisation. Then followed the Conference at San Francisco which adopted the Charter of the United Nations on June 26, 1945. The establishment of the United Nations with the International Court of Justice marks the supremacy of International Law. The Charter makes it obligatory on the General Assembly to initiate studies and make recommendations for the purpose of promoting international co-operation in political field and of encouraging the progressive development of International Law and its codification The International Court of Justice has to decide disputes in accordance with International Law. These provisions of the Charter raise a legitimate expectation that International Law has a bright future.

CHAPTER IV

LAW OF NATURE AND ITS INFLUENCE ON THE DEVELOPMENT OF INTERNATIONAL LAW.

Law of Nature defined.—In order that we may appreciate the profound influence of Law of Nature on the development of the International Law it is necessary to get a clear understanding of the concept of Natural Law.

Some of the synonyms of the terms 'Law of Nature' or 'Natural Law' are :—'Divine Law' meaning law imposed by God upon man ; 'Law of Reason' meaning rules founded upon right thinking and appealing to the rational nature of man ; 'Un-written Law' meaning law not enacted by man but given by nature ; 'Eternal Law' meaning law which is true, everlasting and unchangeable; and 'Moral Law' meaning law of conscience or rules of conduct founded upon what is right and wrong. Whatever the name, it means a natural and universal principle of right and wrong, a principle which is immanent, immutable and eternal—a principle not laid down by man but inherent in the rational nature of human beings and a principle which is true and wholly perfect. *Salmond*, defines natural law as "principles of natural right and wrong—the principle of natural justice, if we use the term justice in its widest sense to include all terms of rightful action." It will be instructive to know what some of the early thinkers meant by this term.

Cicero.—"There is indeed a true law (*lex*), right reason agreeing with nature, diffused among all men, unchanging, everlasting............It is not allowable to alter this law, nor to derogate from it, nor can it be repealed. We cannot be released from this Law, either by the *praetor* or by the people, nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens, one law today and another hereafter, but the same law everlasting and unchangeable, will bind all nations at all times ; and there will be one common lord and ruler of all, even God the framer and proposer of this law."

Justinian.—"Natural law (*Jura naturalia*) which is observed equally in all nations, being established by divine providence, remains for ever settled and immutable ; but that law which each State has established for itself is often changed either by legislation or by the tacit consent of the people".

Hooker.—"The law of reason or human nature is that which men by discourse of natural reason have rightly found out themselves to be all for ever bound unto in their actions."

Christian Thomasius.—"Natural Law is a divine law, written in the hearts of all men, obliging them to do those things which are necessarily consonant to the rational nature of mankind, and to refrain from those things which are repugnant to it".

Varying concept of Law of Nature.—The above definitions of the law of nature make it clear that the concept has no fixed meaning. What law of nature stands for has not so far been fully explained. Philosophers and Jurists who have tried to understand the concept of law of nature and who employed this concept in erecting the edifice of International Law do not always agree as to the contents of this law. It is the particular aspect from which the law of nature is looked at, gives an idea as to its particular meaning. None who has defined it has been able to give an exhaustive meaning of this concept. There is however no dispute that the law of nature is the ideal law which must shape the conduct of human beings and which gives us an insight into what is right and what is wrong. It is also admitted that rules of law of nature do not descend from above but are to be deduced by human reasoning. It is the human mind that has to reason to distinguish between right and wrong and to apply right standards to human affairs. A human mind well developed will naturally get better results than one not so developed. A man's prejudices, whims, his ideas of morality, the political views that he possesses and his religious convictions will have an important influence in the process of reasoning that he has to make. Not only this, the stage of civilization which his country has reached and the exigencies of life in which he finds himself at a particular time will have their own effect on his mental equipment. What is right to a civilized nation of the present time may prove to be wrong to a world two centuries hence. The moral values suffer a change with the times and the law of nature which depends for its elucidation in the human mind is a concept of changing values.

Benthem was not wrong when he said : " a great multitude of people are continually talking of the law of nature ; and then go on giving you their sentiments about what is right and what is wrong ; and these sentiments, you are to understand, are so many chapters and sections of the law of nature,[1]"

1. Benthem : Principles of Morals & Legislation.

for he only emphasized the vagueness of the concept and its changing values and did not show contempt from a great conception. *Brierly* himself admits that the concept in the sphere of human conduct is 'relative to conditions of time and place' for in his criticism of medieval conception of law of nature he observes : 'we realise as they hardly did, that these conditions are never standing still. For us as for them, a rational universe, even if you cannot prove it to be a fact, is a necessary postulate both of thought and action; and the difierence between our thought and their's is mainly that we have different ways of regarding the world and human society."[1]

Despite the fact that the concept is highly illusive jurists who employed it to formulate the rules of International Law acquitted themselves well for they brought to bear a right thinking on the problems before them and deduced principles that met the acceptance of those for whom they were intended. The controversies that arose among these jurists was due more to the fact that they were working upon a material which had different meaning for different persons than to anything else. A study of what this concept meant to different people is highly interesting and it is well worth a brief mention.

Greeks and the Law of Nature.—Four centuries before the Christian era the Greeks had developed a system of International Law operating on the various States which had then come into existence. They had an International Law both of war as well as of peace. The Greek States entered into innumerable treaties between one another. These treaties were of peace and were concluded on solemn oaths. These had the sanctions of *Zeus*, the guardian of oaths. Permanent embassies were also exchanged among these States. The Greeks believed in a 'universal law of nature' which was binding upon all men. Their notion of Natural Law was peculiar in that they regarded the rules deduced from this law applicable only to them and not to barbarians The distinction between right and wrong did not deter the Greeks from committing atrocities on States other than Greeks. Their law was partial and discriminatory. The rule of right reason was motivated by self interest and by a sense of superiority. Such an ideology could not bring stability to their political organisation and the inevitable fall of Greeks could not be avoided. *Kelsen* also observes : "The Natural Law doctrine is based on the illusion that it is possible to obtain from our insight in nature, that from our knowledge

1. J. L. Brierly : The Law of Nations p. 22.

of facts, a knowledge of what is right and wrong. To infer from that which is and that which ought to be,is a logical fallacy. Hence the most contradictory principles have been deduced from nature as rules of natural law which in truth are nothing but maxims differing according to the moral-political creed of their author." *Grotius* himself as will appear hereafter considered that civilized nations were alone capable of discovering the principles of Natural Law.

The Greeks believed in a higher law which according to *Aristotle* presented 'a natural and universal principle of right and wrong, independant of any mutual intercourse or compact.' *Aristotle's* great contribution to legal thought is the distinction between legal and natural justice. According to him legal justice, or positive law is man-made while natural law derives its force from what is based on human nature everywhere and at all times.

Romans and the Law of Nature.—What Greeks and Stoics could not do was accomplished by the Romans who employed the concept of law of nature to formulate legal principles of practical utility not only for themselves but for all the world. Since law had to be administered to large number of non-Romans who had their own customs, the principles of natural law helped Romans to lay down the *Jus gentium* being the enbodiment of law and usages observed among different people. It was Law of Nature which provided a basis for a law governing Romans and non-Romans.

Romans regarded *jus naturale* as a higher law. *Cicero* speaking of this law said : "It is not allowable to alter this law nor deviate from it, nor can it be abrogated. Nor can we be released from this law, either by the Senate or by the people" The principles of natural law found their way to the Roman legal system through judicial process. The judges and magistrates administered rules of natural justice based upon reason whenever they found it necessary The Romans did not regard Natural Law as opposed to or in conflict with positive law. The rules of Natural Law as understood by them were constantly applied to soften the rigour of their own positive law and the resultant rule worked so satisfactorily that it became a model for the posterity. The Romans succeeded in adopting the rules of this higher law whenever they found their own rigid rules unsatisfactory because they regarded the Natural Law as binding upon man who was but a part of nature.

Medieval conception of Law of Nature.—The ninth century Europe saw the ascendency of the Christian Church

in the political as well as social field. The Christian religion prevailed throughout Europe and Christian ideology dominated even the spiritual and legal thought. The fathers of the Church regarded Christian faith as the supreme law of the universe. They assumed that the church was the best exponent of the law of nature. The law of nature was regarded as, but a part of Divine law which was immutable and higher than all positive law. *St. Thomas*, the greatest philosopher of this period argued that as the world was ruled by Divine Providence, Divine law was supreme. That part of divine law which reveals itself to reason was natural law. According to St. Thomas man can discover right and wrong by applying Divine law to human affairs. The medieval philosophers did not completely exclude reason as the *media* for the revelation of natural law but they gave it a subordinate position and upheld the supremacy of the Church as the interpreter of the Divine law for application to human affairs. The law of God as revealed in scripture was held supreme and it was only in those cases in which such law was silent or ambiguous that reason was permitted to be employed to expose the divine law and thereby bring in rules of natural law to apply to human affairs.

Grotius and the Natural Law.-The existence of a number of independent sovereign States in Europe of his time led *Grotius* to search for a law which may be powerful enough to control their mutual dealings. He was in quest for a law higher than that which a sovereign ruler of State laid down for his subjects. The natural law which appeared to him to be source of such a higher law was 'the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational nature, has in it a moral turpitude or a moral necessity and consequently that such an act is either forbidden or commanded by God, the author of nature.' To him such a law was alterable only by God, was just as it had the approval of God. *Grotian* law of nature was positive law as being command of God. He maintained that if the principles of natural law are rightly attended to they are patent and evident almost in the same way as things perceived by senses. According to *Grotius* there is no mysticism attached to these principles which are deducible from right reason. The rules of natural law are applicable both to individuals and States. He argued that individuals as well as States could not exist without recognition of mutual rights and that this recognition was possible only if they conform to a course of conduct prescribed by the dictates of right reason.

Grotius attempted to blend natural law, Roman law and State practice into one whole system and produced some confusion. He did not always distinguish between the law that is and the law that ought to be. His natural law rules represented what ought to be and could not be identified with what is. A rule of conduct laid down by a political superior is no doubt law and it does not cease to be law if it does not stand the test of natural law. *Grotius* failed to maintain consistency in his reasonings by reason of his failure to distinguish between the principles serving as a standard and the existing rules to be judged by that standard.

Grotius was not unconscious of the varying nature of the concept of natural law. His principles of natural law are deducible from an application of right reason and are evident as things perceived by senses if right manner is adopted. He does not, however, think that all nations or individuals are capable of applying right reason for he limits the discovery of principle of natural law to civilized nations and excludes uncivilized nations as being disqualified to hear the voice of nature. His natural law depended on the enlightenment of human reason.

Hobbes and the Law of Nature.—The concept of natural law had a different meaning for *Hobbes*. He did not regard law of nature as the command of God. He perceived law of nature completely disassociated from theology. To *Hobbes* Church was subordinate to the State and natural law had no sanction. His natural law is equivalent to justice, equity, modesty, mercy and in sum doing to others as we would be done to. In his opinion natural law was opposed to natural passions of man. According to him the individuals come together and form into States, thereby surrendering their freedom for their safety and preservation. While the States having no superior to keep them under restraint are in a state of nature at war with another. The peculiar position of the State makes it possible to claim sovereign power. *Hobbes* took the view that law of nature applied both to individuals as well as to States. He explained : "The maxims of each of these laws are precisely the same ; but as States, once established, assume personal properties, that which is termed the natural law, when we speak of the duties of individuals, is called the law of nations when applied to whole nations or States." To him the law of nations was the law of nature as applied to States.

Pufendorf and the Law of Nature.—To *Pufendorf* the law

of nature is nothing more than what reason dictates in a particular state of circumstances. He argues that when man first of all lived in isolation and did what seemed right to him he was guided by those rules which his reason discovered to be right. These rules discovered by human reason really belonged to law of nature. *Pufendorf* maintains that the States having no superior over them are bound by Law of Nature. The law of nature governing the States according to *Pufendorf* represented these rules which are deduced from an application of reason to international matters.

Vattel and the Law of Nature.—Vattel starts with what he calls a settled point that all men inherit from nature a perfect liberty and independence, of which they cannot be deprived without their consent. He goes on to say that in a State the individuals do not enjoy perfect liberty or independence because they have made partial surrender of them to the sovereign and that a State remains free and independent as long as it does not voluntarily surrender its independence. To him Law of Nature applies both to individuals and to States but in asmuch as the two subjects of law are different, the Law of Nature which applies to men is different from that which is applicable to States. He explains that a particular rule which is perfectly just with respect to one subject is not applicable to another subject of a quite different nature. His argument is that law of nature is binding on men and as States are composed of men, they are also absolutely bound to observe Law of Nature. The law which applies to States or nations is according to him, Necessary law of Nations. *Vattel* describes this Necessary Law of Nations as immutable, as being founded on nature of things and particularly on the nature of man and emphasizes that the States cannot make any change by conventions in the obligations which necessarily follow from this immutable law, cannot dispense with them in their own conduct and also cannot release each other from the observance of these. This necessary law of nations is the standard by which the lawfulness of the conventions or treaties are to be judged and it is one that is obligatory on the conscience of States.

Vattel, thereafter finds another kind of law which applies to States and names it as Positive Law of Nations This Positive Law of Nations is subdivided into branches of law, the Voluntary Law, the Conventional Law and the Customary Law. His thesis is that it is in the nature of men to live in society, to be bound to cultivate such society and to discharge its duties and that States when formed are also obliged to live on the

same terms with other societies like men. The society of nations is thus established by nature and it is obligatory on the States to give mutual assistance. As State is obliged to contribute everything in its power to the happiness and perfection of the other States, it is necessary that it must suffer some thing to be done and not oppose them in the interests of the society of States. The rules deduced from such a course of conduct constitute voluntary law of nations. States often enter into engagements with other States. The obligations flowing from such engagements make conventional law of nations which is particular and not general. Certain maxims and customs consecrated by long use and observed by nations in their mutual dealings form customary law of nations.

Law of Nature and its Influence.—Legal history all the world over-evidences that the concept of natural law in some form or other provided a model for the first man-made law. Such a concept of lofty idealism could not fail to attract the earliest thinkers busy in formulating rules for guidance of States in their mutual dealings. In Europe the Greek City States having common race, religion, customs and language were the first to feel the necessity of some kind of rules for the regulation of their mutual relations and their *jus naturale* provided the basis for a system of International Law. "It is the Greek City State and to their great philosophers that we must look for the earliest affirmation of this 'right law' and for the most emphatic recognition of its authority. The 'Laws of Hellenes' as they were called, consisted partly of customs based upon natural or universal law and partly of express conventions between the separate city-State".[1]

The *jus gentium* of the Romans which was based on the rational nature of man was originally applicable to the subjects of different States. In course of time owing to the influence of *jus naturale* of the Greeks on it, the scope of *jus gentium* widened so as to include rules governing the relationship of States. The Romans came to regard law of nature as synonymous with law of nations. Emperor Justinian defined law of nature as that law "which nature teaches to all animals". The Emperor further said : "The civil law is that which each nation has established for herself, and which peculiarly belongs to each State or civil society. And that law which natural reason has established among all mankind, and which is equally observed by all people, is called the law of nature, as being a law which all nations

1. Fenwick : International Law (Third Edition) P, 47.

follow." The Romans thus believed that the obligations of law of nature were reciprocally binding on nations and that the right of legation was derived from such law. Their fecial law was only a branch of law of nations. It was *jus gentium* based on natural law which offered a solution to the disputes between the States. Elaborate rules of International Laws were laid down by the Romans with the help of natural law and their contribution in the shaping of the modern International Law cannot be overlooked.

The Christian teachings which came to influence juristic thought could not altogether drive away natural law from the field of its operation. The concept of natural law still continued to exercise its influence along with the principles of Christianity. The Reformation marked the repudiation of the spiritual authority of the Church and a new order was ushered in.

The *jus gentium* of the Romans or the Law of Nature governing relations of States was not at all affected by the teachings of the Doctors of the Church who had been since the fifth century busy in an enquiry into the ethics of war. There was a controversy in the Christian Church about the lawfulness of war on the ground that the command in the Bible 'Thou shalt not kill' prohibited all war. It was *St. Augustine* who brought reason to bear upon the construction of the Bible and who declared that war was permissible to Christians only on a just cause and that the ruler was responsible to find out the justice of the cause and to declare war. This doctrine was elaborated and given a logical form by *St. Thomas. Acquines* who systematized the view current in the thirteen century. The doctrine of lawfulness of war was further analysed by *Giovanni da Legnano*, a Professor of the University of Bologna who wrote a treatise entitled- 'De bello de represaliis et de duello' in 1360. His conclusions were mostly based on the Bible, the civil and canon laws. He mainly agrees with the principles laid down by *St. Augustine* but deals with the subject of law of war more thoroughly. During the fifteenth and the sixteenth century a number of Italian writers brought out their books on the law of war based upon their interpretation of the civil and canon laws and views expressed by writers who preceded them. Besides these Italian writers there were a number of Spanish writers who carried on researches on the lawfulness of war and published their conclusions upon the subject. The most notable among them was *Franciscus Victoria* (1480-1546) who sought to justify the Spanish conquest of American Indians.

Victoria based his conclusions not only on canon law but also on natural reason. It will be noticed however that these writers Italians as well as Spanish treated the same subject with distinct reference to the doctrine of catholic church and that they did not direct their attacks against the *jus gentium* of the Romans. A close study of the writings of these Catholic Christians will show that they believed in a divine law or law of God which according to the Romans was the law of nature. It would not be wrong to say that the canonists were influenced by the *jus naturale* and had great respect for the Roman *jus gentium* which had come to be identified with the *jus naturale.* To St. Thomas Acquinas the law of God was divisible in two parts, namely, that part of law which was directly revealed by God and the other part of law which man can discover by reason. He defined law of nature as that part of divine law which can be discovered by human reason. The other important writer, Victoria made no secret of the fact when he discussed the question of the rights of the Indians conquered by Spain that he would test the rights of Indians who were savages not by human but by divine law which was nothing more than natural law as perceived through religion.

The Roman law which had been codified in the reign of Justinian and which had become known as *Corpus juris civilis* contained many rules governing the mutual relation of princes and was constantly applied to solve problems connected with inter-State relations. Its rise to fame though slow was so sure that by the end of the sixteenth century it won the admiration of most of the European nations. Some of the European countries adopted it as law while others referred to it in matters on which their own law was silent. That part of Roman law which applied to inter-State relations by reason of the fact that it was based on law of nature and had been accepted by the church provided a basis for jurists for the development of a systematic law of nations. It was the element of law of nature which had been imported into their law by the Romans that won for the Roman law such a place that withstood the strong current of power politics of the first half of sixteenth century. The beginning of the sixteenth century saw a number of independent States which in their own interests fought with one another. The rulers of the States believed in the principle that diplomacy and war were the means to power and that the strongest or the most subtle among them could alone prescribe a rule of conduct governing their mutual relations. This belief was strengthened by the teachings of the great statesman, *Machiavelli* whose book "The Prince" became a guide to the rulers and the Generals

of his times. He taught that the rules of morality did not apply to State matters and that force and treachery were twin tools of power for a prince. These unholy principles fitted with the spirit of a time when neither the Pope nor the Emperor had power to exercise any control over the States each of which was doing its best to increase its strength at the cost of other. This was a period in which inspite of what the canonists had taught about the lawfulness of war, States were engaged in wars which were nothing more than orgies of lust inhuman cruelty and destruction. The possible results of the Machiavellian politics clamoured for change of thought and action. The European Continent was now weary of the treacherous conflicts, dirty diplomacy and unholy intrigues and was prepared to listen to reason.

It is thus not surprising that two currents of thought flowed during the closing years of the sixteenth century. On the one hand the concept of sovereignty was being examined in all its aspects in a juristic way while on the other, a logical basis for international jurisprudence was being seriously discovered. It was the French scholar, *Jean Bodin* who is respnosible for introducing into politics the concept of sovereignty and for defining its limits. He defined sovereignty as the absolute and perpetual power within a State, an unlimited power over citizens and subjects, unrestrained by law. According to *Bodin* the sovereignty in the case of a democracy resided in a body of citizens while it resided in the person of the king in a monarchy. The sovereign power, as conceived by *Bodin*, was subject only to the laws of God, of nature and of nations. *Bodin's* work entitled De Republica (1586) containing a systematic exposition of the concept of sovereignty was well received throughout Europe as an apology for the pure absolutism founded by Louis XI of France (1461-1483). *Bodin* in his support for absolutism was opposed by a group of political philosophers known as Monarchomachs who maintained that sovereignty resided in the people and argued that the government whether a monarchy or a democracy was the result of a written or tacit contract between the ruler and the ruled. The leader of this group was *Johannes Althusius* who in opposition to *Bodin* preached that the ultimate source of sovereignty was the people and that sovereign power was neither supreme nor absolute and further that it was subject to laws of God, of nature and the terms of the contract with the people.

The other current of thought about the logical basis of International Law had its source in the writings of such jurists as are generally called the fore-runnners of *Grotius* who came

with their expositions of the system of International Law towards the close of the sixteenth century and the beginning of the seventeenth century. This was the period which was very favourable to the growth and development of law of nations. The establishment of a large number of independent States having a community of interest during this period made the need for the rules of International Law keenly felt. These forerunners of *Grotius* were fired with the zeal of building up a system of law for the guidance of the various States. Of these only three need be mentioned. *Balthazar Ayala* was a Spanish in service as a judge in the armies of the Prince of Parma. His book entitled '*De jure et officiis bellicis et Disciplina Militari*' was published in 1582. He preaches in favour of a law of war and of a law of nature as governing rules of conduct among States. He discusses a number of topics of International Law and also deals military discipline. Then there was *rancisco Suarez*, a Spanish jesuit and a Professor of theology in the University of Coimbra. His book '*Tractatus de legitus et des legislatore*' was published in 1612. To him goes the credit of bringing an idea of a community of States in International Law. His main theme was that such a community of States must be governed by law supplied by natural reason and custom. The third and the greatet writer was *Gentilis*, an Italian jurist (1552-1608) about whsom *Holland* said : "The first step towards making International Law what it is, was taken not by *Grotius* but by the Perugian refugee, the adopted son of Oxford, *Albericus Gentilis*." He occupied the chair of Civil Law at Oxford University. He worked upon law of nature to find out a theory of law governing inter-State relations. He regarded natural law as embodiment of what is just and rational. *Holland* observes : "It was left for Gentilis, starting from the doctrine of Natural Law as thus elaborated to give it a practical application to the development of a law of nations. In the path thus opened up *Grotius* followed ; and after him have come the whole series of writers on International Law."[1] He relied upon the Bible, the writings of canonists, Justinian institutes and the State practice for his conclusions. He referred International Law as a living organism. He published a number of books of which the most important are *De Legationibus*, the *De jure Belli* and the *Advocatio Hispanica*. Gentilis left a permanent mark on the system of International Law.

It was left to *Hugo Grotius* (1583-1645) to reconcile the conflicting views on the concept of sovereignty and to place

1. Holland : Studies in International Law. p. 21.

International Law on a solid foundation. He defined sovereignty as "that power whose acts are not subject to the control of another, so that they may be void by the act of any other human will." To him sovereignty was not absolute, but was limited by Divine Law or Natural Law, the rules of International Law and the agreements between the ruler and the ruled.

Grotius known as the 'Father of Internationl Law' based his system on natural law which he defined as " the dictate of right reason which points out that a given act, because of its opposition to or conformity with man's rational nature is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the author of nature." In addition to natural law Grotius recognised the force of those rules which were based upon customs and usages. But in case of conflict between the rules of natural law and the customary law, the former prevailed.

Jurists who followed Grotius and the various schools of thought that sprang up after him raised theoretical controversies as to the applicability of the law of nature to the international problems. In spite of these controversies the natural law continued to be a source of inspiration to international legal thoughts After the French Revolution the influence of Positive School predominated, although some of the jurists still adhered to the law of nature. But this influence was not to last long because we find that at the end of First World War the hold of Positivists over the legal thought was greatly weakened. Jurists in order to find out means to prevent further wars failed to find a solution in the theories of Positive School and had recourse to rules of justice and to general principles of law The Second World War gave an impetus to put International Law on a firmer basis so as to ensure peace for the future and the exigencies of modern complex society helped the formulation of new theories.

The above brief survey will show that it is the law of nature which has shaped International Law. "Whatever we may now-a-days think of this law of nature, the fact remains that for more than two hundred years after Grotius, jurists, philosophers and theologians primarily believed in it. And there is no doubt that, but for the system of the law of nature and the doctrines of its prophets, modern constitutional law and the modern Law of Nations would not be what they actually are. The Law of Nature supplied the crutches with

whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. The modern law of nations in particular owes its very existence to the theory of the Law of Nature."[1]

It would be just to say that the development of International Law was largely due to the great conception of natural law. The great service done by this concept in the making of the law as it stands today has been unanimously acknowledged. There is no doubt that jurists have taken conflicting views as to the reality of the concept for there is a view that the concept of natural law is purely imaginary and has been created to gain favour of rulers and diplomats. *Kelsen* asserts that the doctrine of natural law is an illusion and principles deduced from the so-called natural law are mere maxims which exhibit the moral-political creed of the author. But he however observes : "It stands to reason that any law-maker is determined in his activity by such maxims. Hence it is quite understandable that principles presented by writers such as *Grotius*, *Pufendorf*, *Vattel* and others, as natural law allegedly deduced from the nature of the State or the International Community were of decisive influence on the practice of States by which customary International Law has been developed."[2]

Natural Law still at work.—International Law cannot yet be said to be fully developed. It is still in the process of development. The concept of law of nature which gave a start to the development of International Law is still active though in a different form. It is true that no principle of natural law can override the settled rule of International Law; it is equally true that undisputed principles of natural justice are readily applied to cases on which the existing rules of International Law are either silent or ambiguous. The decisions of the Intetnational Courts bear testimony to the fact that principles of international morality which is merely another name for natural law have been freely applied to matters of international disputes. The Permanent Court of Arbitration in the case of the Preferential Rights claimed by the Blockading Powers from Venezuela (1904) gave judicial recognition to the application of rules of international morality when it declared that good faith "ought to govern international relations." The Court in a number of cases examined the matter at issue before it from equitable point of view and emphasized that equity

1. Oppenheim—International Law Vol. I (Seventh edition) p. 89.
2. Kelsen—Principles of International Law p. 311.

played an important role in international relations. In the case of the Norwegian claims against the United States of America (1922) the Court had to decide the controversy in accordance with the principles of law and equity. The court in interpreting the words 'law and equity' observed : "The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any country." The expression 'general principles of justice' means nothing more than principles of natural justice. It will be noticed that while in substance the rules of natural law are freely pleaded by the parties to an international dispute, and are freely applied by the International Courts when necessary the reference is made not to natural law but to equity, good faith and like expressions. There appears to be a shyness about the use of the expression 'natural law' or 'natural justice'.

The statutes of the Permanent Court of International Justice as well as of the International Court of Justice authorise the application of the 'general principles of law recognised by civilized nations.' Such a provision enabled the Permanent Court of International Justice to apply rules of equity to the matters in issue before it. In the case of Diversion of Water from the Meuse (1937) the Court observed that "under Article 38 of the Statute, if not independently of that Article the Court had some freedom to consider principles of equity as part of the International Law which it must apply". Article 38 of the Statute of the International Court of Justice confers on the Court a power to apply general principles of law whenever necessary. The expression 'general principles of law' is wide enough to cover the rules of all that stands for the equally vague expression 'natural law' or 'natural justice.' Equitable principles have their source in natural justice and they find application in international disputes. The Court, it is no doubt true, has always hesitated in applying the general principles of law frequently but it has not failed to employ them when it was found absolutely necessary to do so. *Lauterpacht* observes : "Experience has shown that the main function of "general principles of law" has been that of a safety valve to be kept in reserve rather than a source of law of frequent application. As a rule the two primary sources of International Law in Article 38 (treaty and custom) have provided a sufficient basis for decision. The very comprehensiveness of the power inherent in the authorisation to resort to 'general principles of law' has counselled moderation in its use. This is so in particular having

regard to the fact that while in the municipal sphere the consequences of having recourse to general principles of law are limited for the reason that on the whole, the law does not in that sphere depart from the general sense of legal propriety, this is not always so in the realm of International Law. This is far from signifying that wherever the Court has had recourse to general principles of law its action amounted to judicial legislation. On the contrary, normally it has constituted no more than an interpretation of existing conventional and customary law by reference to common sense and the canons of good faith".[1] If according to *Lauterpacht* the Court is competent to interpret the customary and conventional law by reference to common sense and the canons of good faith, the rules of natural law as deduced by reason come in to the aid of the court and produce the desired result. *Schwarzenberger* speaking of general principles of law says : "In this way ; principles such as that no body should be judge in his own cause, or that both sides should have a fair hearing before a tribunal have been legitimately introduced into the realm of International Law. Equally in cases in which it may be dubious whether a principle of justice and equity or a rule claimed to be derived from principles of natural law can be regarded as a principle of positive International Law, the difficulty may be overcome by showing that such a rule is a principle of law recognised by civilized nations. Thus, this source of International Law is a means of transforming natural law into positive International Law."[2]

The application of 'general principles of law' is called for in cases which are not governed by a clear and settled rule of International Law. Neither in the national nor international sphere rules of law are so formulated as may clearly apply to all possible situations and both in national and International sphere there is necessity of resorting to some principle of justice to meet a situation not covered by the formulated rule of law Now, such a principle of justice is no other than one derived from natural law based on reason. Apart from the provision of Article 38 of the statute, the Court in dealing with a question of International dispute has to apply some rule of justice on a judicial reasoning. The judicial reason has to be brought to bear on the case uncovered by a positive rule of International law. The general principles of law depend for their application on judicial reasoning and the court is thus empowered to provide a solution to any problem submitted

1. Lauterpacht : The Development of International Law by the International Court. p. 166.
2. Schwarzenberger : A Mannual of International Law (3rd Ed.) p. 16.

to it by finding out a rule of law with the aid of reason. Reason is another name for the natural law which has always been a conspicuous basis of a rule of International Law and will always be a guide in the solution of an International problem. Lord Mansfield observed : "The Law of Nations is founded on justice, equity, convenience and the reason of the thing, and confirmed by long usage." 'The reason of the thing' was and will always be a basis for rules of International Law. The British American Claims Arbitral Tribunal in the case of the Eastern Extension, Australia and China Telegraph Company Ltd., (1923) referred to the process of reasoning in cases not directly governed by existing rules of International Law, when it said : "International Law as well as domestic law, may not contain and generally does not contain, express rules decisive of particular cases, but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence ; it is the method by which the law has been gradually evolved in every country, resulting in the definition and settlement of legal relations as well between States as between private individuals."

It is thus clear "that natural law or natural justice is still at work to make International Law a perfect system sound enough to meet all cases and situations.

According to Prof. *Brierly* judicial reasoning plays an important role in the modern system of International Law, for he says that " those who administer law must meet new situations not precisely covered by a formulated rule by resorting to the principle which medieval writers would have called natural law and which we generally call reason." He defines reason as 'judicial' reason which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid, for example, the consideration of precedents, the finding of analogies, the disengagement from accidental circumstances of the principles underlying rules of law already established. The constant application of the principles of natural law based on reason by the courts and tribunals called upon to decide International disputes offers a challenge to the positivist theory and marks a triumph for those universal and unalterable rules of justice deduced from natural law. Prof. *Brierly* speaking about this process of judicial reasoning says : "This source of new rules is accepted as valid and is constantly resorted to in the practice

of States, both in the decisions of International Tribunals and in the legal arguments conducted by foreign offices with one another, so that a positivism which refuses to accept it is untrue to its own promises."[1]

CHAPTER V

CODIFICATION OF INTERNATIONAL LAW

Codification of International Law.—The term 'codification' ordinarily means the process of reducing the whole body of law into a code in the form of enacted law. In the field of International Law the term may mean a systematic arrangement of the rules of law in existence, modification of the existing rules to suit the needs of the times and also formulation of rules on controversial subjects after necessary reconciliation of the divergent views. The object of codification is to remove the uncertainty and obscurity of law and to evolve out of the confused mass of literature on International Law a presentable body of ascertained and agreed rules of law for facility of reference. The attempt at codification of International Law is more than a century old but the problem of codification has become very acute after the establishment of the United Nations Organization with ' codification ' as one of the functions of its General Assembly.

History of Codification.—It was towards the end of the eighteenth century that the idea of codification of the International Law was conceived by *Bentham* who gave to the world Utopian International Law. The earliest effort for codification was made by the French Convention which resolved to draw up a declaration of the Rights of Nations in 1792. The work of drafting was entrusted to *Abbe Gregoire* who prepared a draft. This draft was, however, not approved by the Convention and the attempt failed.

Codification by individual writers.—The real attempt in the direction of codifying International Law was made in 1861 by an Austrian jurist, *Alfens Von Domin Petruscheveez* who published his code entitled '*Precis d'un code de droit international*' The American civil war stimulated an interest in codification of the law with the result that in 1863 *Francis Lieber* published a code of laws of war on land at the request

1. Brierly : The Law of Nations p. 67.

of President Lincoln. In 1868 *Bluntschli*, the celebrated jurist published his code of International Law containing 862 articles with the object of formulating clearly the existing ideas of civilized world. In 1872 *David Dudley Field* brought out his 'Draft Outlines of an International Code' containing 1,008 articles. *Pasquale Fiori*, an Italian jurist published his code of International Law in 1890. This code was published for the fifth time in 1915. In 1910 *Epatacio Pessoa*, a Brazilian jurist published his Code of International Law. Among recent writers who presented the rules of International Law in a systematic form of a code are *Oppenheim*, *Hall*, *Phillimore* and *Hyde*.

Codification by Associations.—The Institute of International Law, a body of jurists of all nations founded in 1873 at Ghent in Belgium produced valuable codes touching a number of subjects of International Law. This body of jurists met periodically and an account of its codification of International Law appears in the successive issues of *Annuaire* Another association which was founded about the same time and which made notable contributions towards codification of International Law was the Association for the Reform and Codification of the Law of Nations. This Association in 1934 adopted a series of resolutions proposing measures that might be taken against violations of the Pact of Paris. The codification projects of the Harvard Research during the period between the two World Wars are invaluable. The merit of the work of Harvard Research lies both in the codes prepared by it and in the commentaries which find place in those codes. The American Institute of International Law which came into existence in 1915 brought out a number of codes on various international subjects. Its first code under the title of 'Declaration of the Rights and Duties of Nations' appeared in 1916.

Codification by Regional Groups.—A conference of American States meeting at Mexico in 1901—1902 arrived at a Convention which provided for the preparation of codes on public and private International Law. In 1906 a committee of International Jurists was appointed to carry on the work of codification. The American institute of International Law submitted a number of codification projects to the American Conference in 1924. In 1928 the American Conference adopted conventions approving seven out of the twelve codes submitted by the American Institute of International Law. These approved codes were on : (1) The Status of Aliens ; (2) Duties of Neutral States in the event of civil strife, (3) Treaties ; (4) Diplomatic Functionaries ;

(5) Consular Agents ; (6) Maritime Neutrality, and (7) Asylum. Under the auspices of the American Conference the Permanent Committees of Rio de Janeiro, Habana and Montevideo and a new International Conference of American jurists were formed for the purpose of codifying the law. In 1939 the Inter American Neutrality Committee was appointed to propose an exhaustive code on the laws of neutrality. These bodies occupied themselves with the problems of International Law during the war and before any result was reached came the United Nations Organizations.

INTERNATIONAL CONFERENCES

Hague Conferences.—The Peace Conference of 1899 marked the beginning of codification through International Conferences. This Conference was called to meet at the Hague on the initiative of Emperor Nicholas II of Russia. The two codes that were produced by this Conference were the 'Convention for the Pacific Settlement of International Disputes' and the 'Convention with respect to the Laws and Customs of War on Land.' The first convention resulted in the establishment of the Permanent Court of Arbitration which settled many an international dispute.

The second Hague Conference which met in 1907 revised the rules of war on land and also produced a number of conventions on other matters. Some of the important conventions that were arrived at during this conference were those concerning opening of hostilities, the status of enemy merchantmen at the outbreak of hostilities, conversion of merchant-men into men-of-war, rights and duties of neutral Powers and persons in land and sea warfare, bombardment by naval forces, and laying of automatic submarine contact mines.

Codification under League of Nations.—The matter of codification of International Law was also taken up by the League of Nations In 1924 the Assembly of the League appointed a Committee of sixteen jurists to report on codification of International Law. This Committee drew up a list of topics which were ripe for codification. In 1927 this report of the Committee was considered by the Assembly and it was decided to hold a conference at Hague for codifying the law on Nationality ; Territorial Waters ; and Responsibility of States for damage done in their territory to the persons or property of foreigners. The first Conference on the Progressive codification of International Law was held at the

Hague in 1930. Three conventions, *viz.*, convention concerning certain questions relating to the conflict of Nationality Laws, a Protocol relating to military obligations in certain cases of Double Nationality and a Protocol and a Special Protocol relating to certain cases of statelessness were adopted by this Conference. A number of States including Great Britain have ratified these conventions.

The Council of the League in 1925 convened a special conference which resulted in a Protocol which has now been ratified by as many as forty States. This Protocol is important inasmuch as it aims at laying down rules prohibiting the use of poisonous and asphyxiating gases. Many other general conventions, concerning a variety of topics *e. g.*, conventions, on the treatment of prisoners of war, the sick and the wounded, conventions concerning air navigation and conventions concerning scientific, economic and humanitarian problems were arrived at under the auspices of the League of Nations. These conventions constitute a step towards systematic codification.

The United Nations.—The Charter of the United Nations lays down in Article 13 that the General Assembly shall initiate studies and make recommendations for the purpose of 'encouraging the progressive development of International Law and its codification'. The Second General Assembly in 1947 decided to set up an International Law Commission to present a restatament of the rules of International Law on certain subjects. The convention on the Rights of the Refugee adopted in 1951 is a comprehensive code on the subject. Another body appointed by the United Nations is the Human Rights Commission which has to study the laws on the rights of individuals. The work of codification on certain other subjects such as the political rights of women, the narcotic drugs and freedom of information is in progress. It is too early to pass any judgment on the work of codification which the United Nations has undertaken. But it is expected that the objective of codification declared in the Charter can be achieved without great dificulty. The co-operation of States is needed to make the law certain and strong.

Codification—Its advantages and disadvantages.—The short historical sketch of the various efforts of the States, individual jurists and scientific bodies for the codification of the law is indicative of the long-felt desire for a complete code in a presentable form. In the case of International Law which is defective on the ground that its rules in some respect are un-

certain and obscure and lack in preciseness and clarity the need of codification is absolute and real.

Advantages.—The advantages of codification may briefly be stated thus:—

(*a*) International Law is uncertain and obscure in various respects. Codification will make the rules certain and clear and will stimulate a desire in the States to refer to them readily.

(*b*) There are numerous gaps in the law so that many matters have not yielded to any rule. If the law is codified these gaps will be filled up and the law will be full and complete.

(*c*) Codification will bring uniformity into the system.

(*d*) Disagreement and controversy that prevails on many matters will disappear when codification will aim at agreed rules by means of conventions.

(*e*) Codification is likely to increase the binding force of the rules and will enable the States more readily either to follow the rule or to submit the matter to the International Court, if they have doubt as to the correctness of the interpretation of the particular rule.

(*f*) The International Court and arbitral tribunals will find it very easy to decide the dispute if they have before them the whole law in the form of a code.

(*g*) Custom because of its slow growth can not keep pace with the changing times and customary rules are not likely to fit in with the needs of a changed society. Codified law can be easily amended on change of circumstances Moreover. codification undertaken at any time must be in accordance with the needs of the society of that time.

Disadvantages :—On the other hand the disadvantages are :

(*a*) The sure growth of customary law which embodies the wisdom and rich experience of ages is obstructed if law assumes the form of a code.

(*b*) Codification renders the law rigid so that a particular case may fall outside the scope of law. Law gets its inadaptability from codification.

(*c*) Codification leads to controversy in interpretation which takes the form of hair-splitting resulting in adherence to the letter rather than the spirit of the law.

(*d*) Codification brings in new and fresh controversies into the law.

Difficulties of codification and their solution.—The difficulties of codification of such a vast law as the law of nations are many and serious A code to be readily useful to the nations must contain agreed rules on nearly all the various topics consistent with the needs of the present society of nations. At present there are many points in which it is difficult to find an acceptable rule, there are innumerable controversies on several topics and there are many unregulated matters on which jurists widely differ. Further, the customary law not having kept pace with the times cannot be adequate in its force and effect. In order to have a well developed International Law it is necessary to codify it. The preparation of a code involves the agreement of all the States and this agreement is not likely to be reached easily. Conflicting interests are likely to prove stumbling blocks in the way of codification. Agreement of States through conventions is possible only if there is a political understanding among the nations. The theoretical concept of Sovereignty and equality of States is a very great obstacle to any understanding although realization of the actuality should unite them for a new world order of everlasting peace. The monopoly of the atomic weapon of warfare with a chosen few must be a sufficient warning to the others that the concept of equality is purely theoretical and that agreement for the good of humanity in general is desirable even at the cost of part of sovereignty.

The history of codification of International Law teaches us that the chief reason which occasioned failure of the League of Nations to codify the law was the political disagreement of the States and their unwillingness to agree to an abstract principle. But the question is whether the attempt to codify be given up. No one who realises the international position will counsel abandonment of the scheme especially in view of the ambition of the United Nations Organization.

The solution of the difficulties is to be sought in the causes which led to the failure of the League and other juristic bodies in their attempts at codification. The disagreement of the States is inevitable in a conference of

States, because the representatives of the State will always bear in mind the needs of their countries, feelings and wishes of their countrymen and it is less likely that they will readily signify their assent in the larger interests of the society of nations. "If it is left to governments to meet in conference for the purpose of deciding what are the rules of International Law, it is inevitable that their efforts will be directed to agreeing—or trying to agree—on the rules of International Law as they ought to be, *i. e.*, the rules which would be appropriate to their present day requirements; and delegates will find that the requirements of the governments are so diversified, so contrary, that agreement is impossible."[1] The individual jurist is also incapable of undertaking this huge task. The work is to be taken up by lawyers and jurists of all the nations with a central International Organization set up for that purpose. The General Assembly may set up a central body of jurists drawn from nearly all the countries. This central body should work out a plan of studies in International Law and cause scientific bodies to be formed in every country. These national body of jurists may be required to prepare their own draft codes. The codes of various countries may in due course be required to be submitted to the central international body of jurists. Then should follow joint deliberations of national and international bodies and the final code may thereupon be prepared. This will then be submitted to the General Assembly. The code so prepared will have its sicentific value and the States will find it difficult to disagree. Thereafter conferences may be held under the auspices of the General Assembly and Conventions may be arrived at. A convention consented to by majority of States may be deemed to lay down universal law. The practice of consenting parties in following the rules embodied in the convention will in due course give these rules great strength and will come to be recognized legal and binding even on States not parties to the convention. These conventions signed by majority of States can easily be reached and they can very much facilitate the completion of the code.

If the study of the law is scientifically made both by the national and central bodies and if the States take a detached view of the science of International Law, the condification will be successful and International Law will become a well developed system.

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1. Sir Cecil Hurst—International Law (Collected Papers) Page 146.

Codification by the United Nations.—The General Assembly of the United Nations is under obligation by reason of the provisions of Article 13 of the Charter of United Nations to initiate studies and make recommendations for the purpose of promoting International Cooperation in the political field and encouraging the progressive development of International Law and its condification. The General Assembly in fulfilment of its obligation established in 1947 the International Law Commission and charged it with the duty of promoting the progressive development of International Law and its codification. The Commission was asked by the Assembly to formulate the principles of International Law as recognised in the Charter and the judgment of the Nuremberg Tribunal, and to prepare a draft Code of offences against the peace and security of mankind. The Commission has been required to prepare a draft declaration on the rights and duties of States on the basis of the Draft Declaration presented by Panama to the Assembly in 1946 and other documents and also to study the dasirability and possibility of establishing an International Judicial Organ for the trial of genocide and certain other crimes.

The General Assembly, it will appear has set up an ambitious programme which will lead to further development of International Law. It may however be noted that the Commission is to formulate principles of International Law as recognised in the Charter and the judgment of the Nuremburg Tribunal. The General Assembly had in its 1946 Session unanimously affirmed the principles of International Law recognised in the Charter and in the judgment of the Neuremburg Tribunal. It will appear that the scope of enquiry of the Commission is narrow but on a careful consideration it would appear that the principle recognised in the Charter and in the judgment of the Nuremberg Tribunal are exhaustive and all the rules of International Law to be codified would be found in those principles. The task of codification so undertaken by the General Assembly is no doubt stupendous but the necessity of times requires the completion of such a task. The history of codification detailed above will reveal that codification of International Law requires the help and assistance of majority of nations of the world. The United Nations Organization in its present position, by codifying the law can resolve all the controversies that prevail on many matters connected with International Law.

The International Law Commission.—The General Assembly by its resolution dated November 21, 1947 set up the

International Law Commission in fulfilment of its obligations under Article 13 of the United Nations' Charter. The Commission has its own statute which prescribes the scope of its authority and its personnel and provides for other necessary matters connected with the work entrusted to it. The Commission is to consist of 15 members to be elected by the General Assembly for 5 years which period was fixed by amending resolution of the General Assembly in 1955. The members of the Commission are to serve not as representatives of the Government of the country to which they belong but in their individual capacity as experts The first election of members took place in 1948. The last election took place in 1956. The members elected in 1956 are still in office.

The Commission has, under its statute, to survey the whole field of International Law and to take up subjects for codification. In its attempt to codify, the Commission has to keep in view the drafts prepared by Governmental agency and other societies and individuals. The Commission has to make a report about the conclusion it may reach, to the General Assembly. The report of the Commission is to contain full materials complete with different views on the subjects, the arguments in favour of the divergent views, the various theories relevant decisions of courts and tribunals and the treaties and pacts on the subjects. The Commission has also been entrusted with the task of finding ways and means for making the evidence of customary International Law more readily available, and to make a report about it to the General Assembly.

Work of the Commission.—The Commission since 1949 when it began its work has been able to prepare a draft declaration on the rights and duties of the States, to formulate the principles of International Penal Law recognised in the Charter and the judgment of the Nuremberg Tribunal, to prepare a draft code of offences against the peace and security of mankind. The Commission also studied the defination of aggression, expressed an opinion about the desirability and possibility of establishing an International Court for the trial of persons charged with the genocide and certain other crimes, made recommendations on the problem of reservations to multilateral conventions, prepared draft conventions on the elemination or reduction of future statelessness, and submitted proposals concerning the ways and means for making the evidence of Customary International Law more readily available. It also prepared a draft convention on arbitral procedure. This draft was considered by the General Assembly

in its legal committee but it was referred back to the commission for further study. The Commission is also considering and preparing draft on the law relating to the regime of the high and territorial seas. It is also studying the law relating to treaties and to diplomatic intercourse and immunities and other topics. The work so far done by the Commission consisted of preparing drafts on the various topics which fall within the scope of its enquiry. The various topics so far considered by it may be stated as follows :—

Draft Declaration on Rights and Duties of States.— The Commission has prepared this draft which consists of 14 articles relating to the Rights and Duties of States. The Draft defines basic rights of States and mentions the following basic rights :—

1. Right to Independence 2. Right to the exercise to jurisdiction over territory in accordance with International Law 3. Right to equality in law 4. Right to individual or collective self defence against armed attack.

The draft specifies eight basic duties of States, namely.— (1) Duty to conduct international relations in accordance with International Law and to observe legal obligation ; (2) Duty to settle dispute by peaceful means in accordance with law and justice ; (3) Duty to refrain from assisting any State resorting to war or other illegal use of force as well as any State against which the United Nations is taking preventive or enforcement action ; (4) Duty to refrain from Intervention and from resorting to war or other illegal use of force ; (5) Duty to refrain from recognising any terrtitorial acquisition from war or other illegal use of force ; (6) Duty to refrain from fomenting civil strife in the territory of other States ; (7) Duty to insure that conditions in its territory do not menace International peace and order ; (8) Duty to respect the human rights and fundamental freedom of all persons within its jurisdiction without distinction of race, sex, language, or religion.

The General Assembly has circulated this draft among the member States and jurists of all nations for their consideration and comments. The member States have been required to suggest as to what further action the Assembly is to take on the draft declaration and also as to the final shape that the declaration is to take. This matter is still under consideration and a final shape will be given after the majority of the member States have put forward their comments and suggestions.

Formulation of the Nuremberg Principles.—As already stated the General Assembly in its session of the year 1946 unanimously affirmed the principles of International Law recognised by the Charter and the judgment of the Nuremberg Tribunal. The Law Commission was asked to formulate these principles and to prepare a draft code of offences against peace and security of mankind. The Commission formulated certain principles which may be briefly stated thus :

1. That crimes against peace, war crimes, crime, against humanity and complicity in any one of these crimes constitute a crime under International Law.
2. That the perpetrator of a crime under International Law is personally responsible for the crime.
3. That the perpetrator of a crime under International Law cannot be relieved of such responsibility and will not be permitted to defend himself on the ground (a) that the act is not punishable under a law of any particular country or (b) that he acted as head of State or responsible Government official or (c) that he acted under superior orders provided a moral choice was open to him.
4. That any person charged with crime under International Law shall have a right to a fair trial.

The Assembly sent these formulations to member Governments for comments. No further action has been taken on the principle laid down by the Commission.

Draft Code of offences against the peace and security against mankind.—In preparing a Draft Code of offences against the peace and Security of mankind the Commission decided to limit the Code to offences containing a political element and endangering or disturbing the maintenance of international peace and security, and omitted such matter as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting of currency and damage to sub-marine cable. It also decided to deal in its Draft Code the criminal resonsibility of individuals alone. The draft Code is, therefore, in respect of crime under International Law for which the responsible individuals are punishable. The offences included in the Draft Code are ; act of aggression ; threat of agression ; preparation by the authority

of a State for the employment of armed force against another State for any purpose other than national or collective self defence or in pursuance of a decision or recommendations by a competent organ of the United Nations ; incursion into the territory of a State. from another State by armed bands acting for a political purpose ; acts by State authority connected with fomenting civil strife or terrorist activity in another State ; violation by State authority of treaty obligations concerning limitation of armaments, military training, fortification, or other similar restrictions ; an annexation of a territory in violation of International Law ; genocide by authorities of a State or by private individuals , inhuman acts against the civilian population when committed in connection with other offences under the code ; acts in violation of the laws of war ; and conspiracy, incitement or attempts to comit any of the offences defined in the code as well as complicity in commiting them, and the intervention by the authorities of a State in the internal or external affairs of another State by means of coercive measures.

The Commission also laid down the principles : that the perpetrator of a crime is personally responsible for it, and that he is not relieved of this responsibility on the ground that the act was done as head of a state or as a responsible government officer or that he acted in pursuance of the order of his Government or of his superior officers if it was possible for him not to comply with the order.

The General Assembly in its session of 1954 postponed the consideration of the draft until the receipt of the report of the new special committee appointed for defining aggression.

Definition of Aggression and steps taken.—As already stated the adoption of the Draft Code of offences against the peace and security of mankind has been made to depend on a satisfactory definition of the word 'aggression'. The idea to define aggression originated with the proposal of U.S.S.R. made before the first (Political and Security) Committee of 1950. The U.S.S.R. proposed that that State shall be declared the aggressor which first committed one of the acts enumerated in the porposal. The Commission in its session held in 1951 at Geneva took the view that it was not desirable to define aggression...by detailed enumeration of aggressive acts as no list of aggressive acts could be exhaustive and that a definition of the word would amount to a restriction on power of the competent organ of

the United Nations. On reconsideration of the matter the Commission decided to formulate a general definition and to include it in the draft code of offences against the peace and security of mankind It agreed to treat as one of the offences 'any act of aggression including the employment, by the authority of a State of armed force against another State for any purpose other than national or collective self defence or in pursuance of a decision or recommendations by a competent organ of United Nations.'

At the seventh session of the Assembly the matter was fully discussed and the Assembly came to the conclusion that a detailed study about the forms of aggression, the connection between the definition and the maintenance of peace the question of the place of the definition in the Code of offences against the peace and security of mankind and the effect of a definition on the work of United Nations Organs was necessary. It was therefore, decided that a Committee of Experts to study these matters and to formulate an acceptable definition should be appointed. Such a Committee known as Special Committee was appointed and it met at the United Nations Head Quarters in September 1955. It considered the questions raised by the Assembly but did not come to any conclusion. It prepared a report giving its views in detail and submitted it to the Assembly and to member States for comment. After the comments from 11 member States had been received the Assembly in its 1957 session considered the report. The opinion in the Assembly was again divided as to the advisibility of formulating the definition of an aggression. The General Assembly in order to co-ordinate the views expressed in the discussion decided to establish another special Committee consisting of 19 members and requested it to submit a report on the questions involved.

International Criminal Jurisdiction.—The International Law Commission was required by the General Assembly to study the desirability and possibility of establishing an International Criminal Court for the trial of genocide and certain other crimes. The Commission reported that the establishment of an International Criminal Court was possible and desirable and that it should not be set up as a Chamber of International Court of Justice. The General Assembly at its 5th session appointed a special Committee to prepare draft convention and proposal on the question of the establishment of an International Criminal Court. This Committee consisting of 17 members met in Aug 1951 in Geneva and prepared a draft statute for an International Criminal

Court. The main proposals made by the Committee are :— (1) An International Criminal Court should be set up by means of a convention adopted in a conference to be called under the auspices by the General Assembly. (2) The International Criminal Court should be permanent and should function only when cases are submitted to it. (3) That International Criminal Court should consist of 9 judges representing as far as possible the main forms of civilization and the principal legal systems of the world. The judges should be elected for a term of nine years by States which are parties to the statute of the court. The expenses of the court are to be met not by the United Nations but by those States. (4) The function of the International Criminal Court is to judge crime under International Law as might be provided in the convention by the States parties to the Statute. The court will not deal with crimes under International Law which are of International concern such as courterfeiting, the traffic in persons, attacks on members of foreign Government and simlar crimes. (5) The International Criminal Court would apply International Law and also national law where appropriate. The jurisdiction of the International Criminal Court would be derived from convention or special agreements of the States parties to the statute, subject to the approval of the General Assembly. In cases which might arise with respect to one or more groups of crimes the States parties to the Statute may enter into convention conferring jurisdiction on the court. In cases where the crime has already been committed two or more States parties to the statute may enter into a special agreement conferring jurisdiction on the court to try the crime. A single State party to the statute may by a unilateral renunciation of jurisdiction may empower the court to try the offence already committed.

The Committee recommended that the General Assembly should call a conference of States for the purpose of establishing the court and for drawing a protocol conferring jurisdiction on the court in respect of the crime of genocide.

The report of the Committee was circulated among the members some of which forwarded their comments. The Assembly found that the report of the committee showed divergence of opinion on fundamental principles, and it therefore decided to set up a new committee to explore the implications and consequences of establishing an International Criminal Court and the various methods by which this may be done and to study the relationship between such a court

and United Nations and also to re-examine the draft statute prepared by the earlier committee.

The new Committee proposed a number of changes in the draft statute prepared by the earlier Committee; It prepared a draft statute on the assumption that the proposed International Criminal Court was separate from the United Nations; and it also prepared a draft statute on the assumption that the proposed International Criminal Court was an organ of the United Nations. This Committee decided that an International diplomatic conference convened under the auspices of the United Nations should draw up a convention for the establishment of an International Criminal Court. The committee was of opinion that such a court should not come into existence unless jurisdiction had been confirmed on it by a certain number of States and until certain number of States had ratified the convention containing the statute of the court. The committee was of the view that the conferment of the jurisdiction should not be with the approval of the General Assembly, and that it would be open to a State to withdraw jurisdiction. It suggested a number of methods for conferment of jurisdiction and also recommended that the right to institute proceedings should vest in States only.

The report of the Committee came up before the Assembly in its session of 1954. The matter was not fully considered because of the suggestion that was made at the outset that the consideration of the matter may be postponed. The Assembly decided to postpone the consideration until it had taken up the report of the special committee on aggression and until it had taken up the draft code of offences.

Reservations to Multilateral Conventions.—The Assembly at the instance of its Secretary-General invited the International Law Commission to study the general problem of reservations to multilateral conventions. The Commission proposed the following rules:

1. That the criterion of compatibility of a reservation with the object and purpose of a multilateral convention applied by the International Court of Justice to the Convention on Genocide was not fit to be applied to multilateral conventions in general.
2. That it was often important to maintain the integrity of a convention than to aim at any price at the widest possible acceptance of it.
3. That a State may make a reservation when signing, ratifying or acceding to convention prior to its entry

into force only with the consent of all States which have ratified or acceded there-to-fore up to the date of entry into force.

4. A State may make a reservation when signing, ratifying or acceding to a convention after the date of entry into force only with the consent of all States which have ratified or acceded.

The Commission suggested that in preparing future convention organs of the United Nations specialized agencies and States should take care to have provisions inserted with regard to the admissibility or non-admissibility of reservations and as to the effects which are to be attributed to them. This recommendation of the Commission was accepted.

The Assembly recommended that the States should be guided by the advisory opinion of the International Court of Justice in regard to Genocide Conventions. The Secretary-General was requested: (a) to act in accordance with the advisory opinion of the International Court of Justice in relation to reservations to the Genocide Convention ; (b) to continue to act as depository in connection with the deposit of documents containing reservations or objections without passing upon the legal effects of such documents in respect of future conventions concluded under the auspices of the United Nations of which he is a depository ; (c) to communicate the text of all future conventions concluded under the auspices of the United Nations having reservations or objections to all states concerned, leaving it to each State to draw legal consequences from such communications.

Nationality and Statelessness.—The International Law Commission selected this topic for codification in its first session. It considered only two points: The nationality of married women and the elimination of Statelessness.

The Commission was asked at its second session in 1950 by the Economic and Social Council to draft a convention regarding the nationality of married women on the basis of the principles to the effect that there should be no distinction based on the sex as regards nationality and that neither marriage nor its dissolution should affect the nationality of either spouse. A draft of a convention on the nationality of married persons was prepared and submitted to the Commission at its session in 1952 by its special rapporteur on nationality. The consideration of this draft was postponed till the whole subject of nationality had been dealt with. The Commission

drafted an International convention on nationality rights of married women and submitted the same to the General Assembly. This draft proposed that the contracting states would agree that neither the celebration nor dissolution of a marriage between one of its national and an alien should have any automatic effect on the wife's nationality and that an alien woman should have facility for acquiring voluntarily her husband's nationality. The General Assembly in its 1955 session approved the substantive articles of this convention but the final consideration was postponed.

The Economic and Social Council requested the Commission in its 1951 session to prepare a draft convention for elimination of statelessness. The Commission prepared two drafts, namely a draft convention on the elimination of future statelessness and a draft convention on the reduction of future statelessness with were transmitted to Governments for comment.

The Commission held a discussion on the comments received from the Governments on the draft convention, and thereafter made a report to the General Assembly. In 1954 session the General Assembly expressed an opinion that it was not necessary to consider the substance of the draft convention. It expressed a desire that an International Conference of plenipotentiaries should be convened for the purpose of concluding a convention for reduction or elimination of future statelessness as soon as at least 20 States had communicated to the Secretary-General their willingness to cooperate in such a conference. So far the minimum number of States have not expressed their willingness.

Arbitral Procedure.—The subject was taken up by the Commission for codification in its first Session in 1949. After discussion of the matter at several sessions the commission approved a draft on arbitral procedure containing 32 articles. This draft was submitted to Governments for comments. On the receipt of the comments some alterations were made to the draft. The General Assembly was asked to recommend the draft to members with a view to conclusion of a convention. The Assembly at its 1953 session decided to send the draft to member States. The Assembly in its 1955 session referred the draft back to International Law Commission for consideration of the comments of the Governments and to make its report on the matter at the 1958 session of the Assembly. The draft convention has proposed judicial arbitration and has provided for rules to safeguard the efficacy of the obligation to arbitrate in all cases in which after the conclusion of the arbitration

agreement the attitude of the party threatens to render nugatory the original undertaking.

CHAPTER VI

INTERNATIONAL LAW AND MUNICIPAL LAW

Nature of conflict between International Law and Municipal Law.—International Law differs from the municipal laws of a State, for while the former governs the mutual relations of the States, the latter regulates the conduct of the individuals within the State. In a State there is a sovereign legislature to enact the laws, an executive organ to enforce these laws and a judicial authority competent to apply the law to causes which are brought before it In the community of States there is no legislature, no executive organ and no law court of the type of a Municipal Court. The municipal law within the State is supreme and the State organs as well as the citizens are bound by it. International Law binds the State as a corporate body ; it does not bind the individuals or the State organs composing the State. A citizen is bound by the municipal law of his State and has no duty to obey the International Law if the municipal law of his State does not provide for his obedience to the International Law, even though the State as corporate body is bound by International obligations. In such a case the conflict arises. In the absence of a municipal law, the executive organ of the State is powerless in preventing the breach of International Law with the result that a citizen is free to violate a law which his own State is bound to respect. Again, If the municipal law of a State orders the doing of an act which the State as a corporate body under an International obligation cannot do, the citizen of that State is entitled to do that act and will ignore the rule of International Law. In such a case the State for want of a suitable law is unable to discharge its international obligation and to prevent the citizen from doing that particular act.

Suppose under a treaty a State is obliged to allow the citizens of a certain foreign State to acquire land under its territories, but there is a provision in the municipal law which prohibits acquisition of land by the foreigners. The

municipal law being supreme within the State will not allow the foreigner to acquire land in spite of the State obligation under the treaty. The position then is this that the international obligations of the State remain intact in spite of any violation by the citizens or the organs of the State Government ; the happenings within the State under the authority of municipal laws have not the effect of absolving the State of its liability to perform the obligations under the treaty.

The obligations under the treaty or under the customary International Law are necessary to be performed by the State irrespective of the provisions of its municipal laws. In order that a conflict between the two systems of laws may not in fact exist, the civilised States of the world have adopted certain practices for the smooth working of both the International and municipal laws. The possibility of conflict between International and municipal law led jurists to enquire into the relationship between the two systems and to find out methods for reconciling them. We shall now look into juristic theories and their implications.

Theories on relationship of International Law to Municipal Laws.—On the question as to how International Law is related to municipal laws of the various States the jurists are not unanimous The divergence of opinion that prevails has given rise to two main theorise, *viz.*, the monistic theory and the dualistic theory.

1. Monistic Theory.—The jurists adhering to Monistic School of thought believe in the unity of the science of law and regard International and municipal law as two phases of one and the same thing. They agree that the object of both the laws is to regulate the conduct of the individuals in two different ways and that one is really complementary of the other. This monistic view is :

(*a*) That unity pervades through the Science of Law. The two systems of Municipal and International Laws are two phases of the single legal order. They are not independent systems.

(*b*) That the International and Municipal Laws are not different from each other. The Municipal Laws govern the conduct of the individual in the State. The International Law though addressed to the States as corporate bodies ultimately reaches the individuals, for states are but groups of individuals.

(c) That both the International and Municipal Laws are imperative in their nature; the State as corporate body under the former by reason of its statehood and the individuals under the latter are absolutely bound irrespective of their will.

(d) That both the systems have their origin in a 'higher law' which is formed upon the principles of right and wrong. The concept of equality of States under the International Law and the principles of equality before the law are both drawn from the same source.

(e) That in fact there is no conflict between the International and Municipal Law, for a State is ever ready to fulfil its international obligations even though there has been a violation under its laws.

2. **Dualistic Theory**—Dualistic Theory is as follows:—

(a) The two systems of International and municipal laws are quite different and distinct from each other. International Law has its source in treaties and customs within the society of nations while Municipal Laws are either enacted laws or customary laws.

(b) Municipal Laws regulate the conduct of individuals while International Law regulates the mutual relations of States. The Municipal laws are commands of a political superior while International Law is not a command but depends on the will of the States.

(c) That the two laws are quite independent, each having its own sphere of operation. They do not come into conflict with each other. The one is not at all related to the other.

(d) That International Law cannot reach the individual unless it has been either wholly or partially adopted by the Municipal Law of the State.

Transformation Theory.—This theory is advanced by some writers to explain away particularly the relation between a treaty and the International Law The exponents of this theory maintain that a treaty can bind the subjects of a State only when it has been transformed into laws of State. They regard that in order that a treaty or convention may reach the individuals it is absolutely necessary that a transformation of

the treaty or convention into national order should take place. Their argument is that treaties are binding on the States only and if they require something to be done by the subjects or organs of the State it is incumbent on the State to enact laws or take other steps so as to make the provisions of the treaty binding on its subjects or its organs and thereby compel them to comply with the terms of the treaty.

This theory being based on the dualistic view already stated cannot be accepted. It loses sight of a distinction which really exists between implementation and transformation. A State only implements the rules of International Law when it enacts laws for its subjects in conformity with the terms of a treaty. *Kelsen* points out : 'If a treaty imposes upon a State an obligation which can be fulfilled only by a legislative act, this act is, as pointed out, no transformation of International into national law undertaken for the purpose of making the application of the treaty possible, but the direct application of the treaty by the competent organ." There is also no transformation when according to constitutional provisions a State is obliged to obtain approval of its legislature with regard to its treaties because the legislature in approving the treaty only participates in the conclusion of the treaty and does not work out a transformation. Moreover, the transformation, if it takes place at all, is the concern of the national order and is not a matter of International Law.

The actual practice of States itself does not support this theory. It is not in every case that a transformation in the the broad sense of the term takes place. It all depends upon the term of a particular treaty and the practice of a particular State. Some treaties are self-operating and do not require transformation. There are however some treaties which require legislative action for their implementation, but implementation is not transformation.

Delegation Theory.—Delegation theory asserts that International Law constitutes a kind of general constitution which delegates to each State the competence to enact laws in conformity with the rules of International Law. According to this theory the State is conditioned upon International Law and that International Law loses its validity if it conflicts with Municipal Law.

This theory assumes the primacy of international legal order. It does not fit in with actual facts inasmuch as the national legal order does not always yield to international legal order.

Kelsen's view on relationship of International Law to Municipal Law—*Kelsen*, considers the legal order as one entity. The thesis is : "The norms of International Law are mostly incomplete norms : They require completion by norms of National Law The international legal order presupposes the existence of the national legal orders Without the latter, the former would be an inapplicable fragment of a legal order. Hence reference to National Law is inherent in the meaning of the norms of International Law. In this sense, the International legal order delegates to the national legal orders the completion of its own norms." He then describes the contents of the norms of the International Law and comes to the conclusion that International Law is superior to national Law for according to him'the international legal order determines the territorial, personal and temporal spheres of the validity of the national legal orders' to enable States to co-exist. *Kelsen* is of the view that theorists who do not accept the monistic view, start from national Law and not from International Law and regards International Law and national Law as two separate mutually independent legal orders. He rejects the dualistic or pluralistic theory as being illogical. He scrutinises every argument advanced by the supporters of the dualistic theroy and finds it untenable. As regards the argument about the difference in the subject-matter between the two legal orders he observes : "We have already shown that the behaviour of a State is reducible to the behaviour of individuals representing the State. Thus the alleged difference in subject matter between International and National Law cannot be a difference between the kinds of subjects whose behaviour they regulate ....But there is no subject-matter which can be regulated only by National Law and not by International Law. Every matter that is or can be, regulated by National Law is open to regulation by International Law as well. It is therefore impossible to substantiate the pluralistic view by a difference in subject-matter between International and National Law."[1]

Kelsen, does not find any difference in principle about the sources of the two legal orders. In order to determine the relationship between National and International Law he examines whether the norms of the two legal orders derive their validity from different basic norms or from the same basic norm. His conclusion is that it is the same basic norm which imparts validity to the two legal

1. *Kelsen* : Principles of International Law p. 404.

orders. Supporting the monistic theory he states: "As long as there was no International Law, the reason of the validity of National Law was not determined by International Law. If International Law does not exist, or is not presupposed to exist as a legal order obligating and authorizing the States, the principle of effectiveness is not a norm of positive law but only a hypothesis of juristic thinking. When, however, an International Law arose—that is to say, when legal norms created by the co-operation of two or more States came into existence—and the principle of effectiveness became a part thereof, the national legal orders were brought into that relaship to International Law which is asserted by the monistic theory."

According to him the unity of the two legal orders is not endangered by any conflict that may arise between them He maintains the primacy of International Law and asserts that International Law is binding on a State of its own force. "If, as in this treatise, the legal construction proceeds from International Law as a valid legal order, the reason of validity of International Law cannot be found in the "will" of the State for which International Law claims to be valid. The reason of validity of International Law is its own basic norm, as formulated in a previous connection."[1]

PRACTICE OF STATES

The significance of the theories stated above will be clear from what civilised States of the World are doing to avoid the possible conflicts between their Municipal Laws and the International Law. The State practices may be stated thus:

British Practice.—The British Courts do not accord an equal treatment to the customary International Law and the Conventional International Law. It will therefore be convenient to discuss the practice of the British Courts under two heads, namely the rules of customary International Law and the rules of Conventional International Law.

(a) **Rules of Customary International Law.**—The statement of *Blackstone* that the International Law "is here adopted in its full extent by the common law and is held to be a part of the Law of Land" expresses the British attitude with regard to the customary International Law which has

1. *Kelsen*: Principles of International Law p. 437.

been universally recognised or has been assented to by Great Britain. The rule that International Law meaning thereby the customary law universally recognised or assented to by Great Britain is part of the Law of land has been recognised by British Courts in many cases.

Lord Atkin in the well-known case of *Chung Chi Cheung*[1] gives the British trend in these words :—

> " The courts acknowledge the existence of a body of rules which Nations accept themselves. On any judicial issue they seek to ascertain what the relevant rule is and having found it, they will treat it as incorporated into the domestic law so far as it is not inconsistent with rules enacted by Statutes or finally declared by their tribunal."

The above dictum of *Lord Atkin* prescribes two conditions which are to be fulfilled if rules of customary International Law are to be found incorporated in the law of England. The two conditions are, firstly that the rule of International Law must be one which has been generally accepted by the International Community, and secondly that the customary rule is not in conflict with any British Statute or judicial decision of the final Court of the land. This dictum has the effect of qualifying the bald rule laid down by *Blackstone* stated above. The same proposition was laid down in the case of *Compania Noviera Vacongado* v. *Cristina SS.*[2] where Lord MacMillan observed thus :—

> " It is recognised pre-requisite of the adoption in our municipal law of a doctrine of public International Law that it shall have attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text books, practice and judicial decisions."

The well-known *Franconia Case* (*R* v. *Keyn*[3]) is some-times cited as laying down a rule contrary to the doctrine of *Blackstone* referred to above. It would appear that the direct issue in that case was whether English Courts had jurisdiction over crimes committed by foreigners in the British maritme belt. The facts of that case were :—

1. (1939) A. C. 160.
2. (1938) A. C. 485.
3. (1876) 2. Exch. D. 63.

A German Vessel Franconia while passing through the British maritime belt within 3 miles of Dover collided with a British vessel which sank. A passenger on the British vessel was drowned and the Captain of the German vessel was tried and found guilty by a British Court. On the question of jurisdiction the majority of the Judges held that the court had no jurisdiction over crimes committed by foreigners in the British maritime belt and Keyn could not be convicted.

The argument in that case was that the English Court possessed jurisdiction to try cases of crimes committed by foreigners in the British maritime belt which was a part of the English territory. It was mainly on the statements and authority of writers and the opinions founded upon them that the Court was called upon to hold that the foreigners on the so-called territorial sea were subject to the general law of the country. Repelling this contention *Cockburn C. J.* observed :—

To be binding the law must have received the assent of the Nations who are to be bound by it. This assent may be expressed by treaties or the acknowledged concurrence of the Governments or may be implied from established usage... ..In the absence of proof of assent .....derived from one or other of these sources no unanimity on the part of the theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would be the clearest proof of unanimous assent on the part of the nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of the nations is doubtless sufficient to give the power of Parliamentary Legislation in a matter otherwise within the sphere of International Law, but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas."

The above case furnishes a solitary instance and is wholly insufficient to disturb the practice evidenced by earlier and later decisions. In a later case *West Rand Central Gold Mining Co.* v. *Rex*[1] it was held that International Law sought to be applied must be proved by satisfactory evidence showing that the particular proposition put forward has been recognised and acted upon by Great Britain or that it was of such a nature and had been so widely and generally accepted that it could hardly be supposed that any civilized State would repudiate it.

To sum up, a customary rule of International Law would be applied by British Courts, if it is such as has received the assent of civilized nations or the assent of Great Britain or has been universally recognised and is not such as is opposed to any British Statute or a judicial decision of a final Court of the land.

(b) Rules of Conventional International Law.—The practice of British Courts with regard to law created by treaties may be stated thus :—

1. International Law based on treaties affecting private rights and obligations is not part of the law of land unless Parliament gives its assent to the treaty by an enabling Act.
2. The rules of International Law which derive their binding force from treaties the terms of which cannot be enforced without modification of common or enacted law are not binding on the municipal courts. They become part of the law of land only after the passing of an Act by the Parliament making suitable provisions with regard to the matter.
3. International Law flowing from such treaties as have the effect of increasing the powers of the Crown or of imposing greater financial obligations on the Government can not be applied by Courts unless the Parliament gives its assent to such a law through suitable legislation.
4. British Courts will not enforce rights or obligations under a treaty which is subject to the approval of the Parliament until it is approved in a proper manner by the Parliament.
5. British Courts will not give effect to the terms of a treaty involving cession of some Btitish territory

1. (1905) 2 K. B. 391.

until the Parliament passes an Act approving such treaty.

6. The provisions of a statute in conflict with the terms of an earlier treaty will prevail before British Courts.

Blackstonian doctrine in modern form.—The bald statement of *Blackstone* made in the eighteenth century has given rise to a theory generally known as Blackstonian or Incorporation doctrine. Blackstone stated his rule thus : "The law of nations, wherever any question arises which is properly the object of its jurisdiction is here adopted in its full extent by the common law, and it is held to be a part of the law of the land."[1]

This doctrine was applied in a number of cases[2] both in the eighteenth and the nineteenth century. In all these cases the British courts applied well-settled principles of customary International Law to the facts before it. As in none of the cases the principles of International Law sought to be applied were in doubt there did not arise a necessity of examining the true scope of the doctrine laid down by Blackstone. In *West Rand Central Gold Mining Co.* v. *The King*[3] Lord Alverstone had to consider the question whether International Law forms part of the law of England. In answering the question Lord Alverstone observed : "It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called International Law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for these tribunals to decide questions to which doctrines of International Law may be relevant. But any doctrine so involved must be one really accepted as binding between nations and the International Law sought to be applied must, like any thing else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature and has been so widely and generally accepted, that it can hardly be supposed that

1. Blackstone : Commentaries Vol. IV P. 55.

2. Triquet v. Balli 3 Burn 1478 (1764), Fenwick cases 31 ; Heath field v. Chilton 4 Burn 15, 20, 16 ; Vivcosh v. Becker 3 M. & S. 284, 292, 298 ; De Watz v. Hendrichez Bings 314, 315; Emperor of Austria v. Day & Kossuth, Fenwick cases 253, The S. S. Lotus P. C. L. J. Series A. No. LV p. 54 ; Dolder v. Huntingfield IIV, 283; Woltt v. Oxhalm 6 M. & S. 92 ; Novello v. Torpood B. & C. 554 ; De Watz v. Hendricks 2 Bing 314.

3. (1905) 2 K. B. 39.

any civilized State would repudiate it." Now this case puts certain limitations upon the rule stated by *Blackstone*. It is also clear that the rule relates only to customary International Law. In latter cases[1] the rule laid down by *Lord Alverstone* was reaffirmed as stated above.

The Incorporation theory must be understood to mean that a customary rule of International Law assented to by Great Britain or assented to by other civilized nations or is of such a nature as has been widely recognised and is not in conflict with any statute or with any decision of a final court will be deemed to be the part of law of England.

The Incorporation theory finds more limitations with regard to that part of International Law which has treaties for its source. The British Courts apply this law more cautiously. *Oppenheim* States the law thus :

"Such treaties as affect private rights and generally, as require for their enforcement a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament. To that extent binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by legislature." There is another limitation to this doctrine and it may be stated that a statute in conflict with an early treaty obligations will prevail.

The doctrine of *Blackstone* maintains the primacy of International Law which, subject to certain exceptions, becomes incorporated in the municipal law of the country.

Kelsen, explains the doctrine thus :

"Expressed in the usual language of personification, the will of the State which is the reason for the validity of its national law is also the reason for the validity of International Law. If International Law is valid for a State, it is valid because the State so wills, and this will of the State is manifested in its tacit or express recognition of International Law. By such recognition the State makes International Law part of its own law. This doctrine prevails in Anglo-Saxon jurisprudence."[2]

The primacy of International Law does not however destroy the effectiveness of the enacted law when the latter is in conflict

1. (1939) A. C. 161 ; (1430) A. C. 485.

2. Kelsen—Principles of International Law P, 435.

with International Law. The rule of primacy of International Law raises a presumption that the municipal law is not in conflict with International Law. Since a State has to discharge its obligations under the International Law it can hardly afford to enact laws which are in conflict with such obligations. It will therefore appear to follow that the international legal order is superior to national legal order and the rules of the former according to British practice, become incorporated in the latter under certain conditions.

To enable the court to give effect to International Law, certain rules of procedure have come into existence. The courts instead of requiring evidence on matters within the scope of the executive authority, accept without question the statement furnished by the Executive on such matters. In so doing the courts do not pause to think whether the statement made by the Executive is in violation of some principle of International Law. The courts will decide the case on that statement even though it may conflict with International Law. Similarly, the courts have made it a rule not to question the validity of an act of State which is an exercise of the sovereign power of the State. This principle has been laid down in the case of *Cook* v. *Sprigg*[1]. The courts have further taken the view that they will follow their own interpretation of the rule of International Law which is sought to be applied to a case before them.

The result is that the Blackstonian doctrine in the modern form is to be accepted with the following qualifications :—

1. A rule of International Law in conflict with an Act of Parliament does not become part of law of the country and is not binding on courts.
2. The terms of a treaty though binding on civilized nations do not become part of the law unless they form part of an Act of Parliament.
3. A statement of the Executive on matters falling within the scope of sovereign power can not be questioned by the Courts and is binding on them even though it may be inconsistent with certain rule of International Law.
4. The Courts are bound to apply the rules of International Law according to their own interpretation of those rules.
5. The Courts are not competent to adjudicate upon

1. (1899) A. C. 572.

rights and obligations arising under an act of State which they can not question.

The modern form of the doctrine reaffirms the view that the basis of International Law is the consent of the States and is consistent with the Positivist theory which holds the field. The Incoporation theory has not only inparted superiority to the rules of International Law but has the effect of resolving the conflict between national and International Law to a very great extent. *Brierly* observes[1] :

> "It is also a beneficial doctrine, both because our courts regard International Law as authoritative in its own right, and also because by asserting that it is part of the law of the land we deny that it has any specific quality which distinguishes it from that law."

American Practice :—International customary Law as has been universally recognised or has been consented to by America is binding on American Courts even if the Intarnational Law is in conflict with the previous Municipal Laws :

(*i*) International Law based on conventions and treaties entered into by America overrides existing Municipal Laws and is absolutely binding on American Courts provided that there is nothing, in International Law, repugant to the American Constitution.

(*ii*) The Municipal Laws making provisions in violation of the existing International Law are binding on American Courts and the International Law thus over-ridden has no force.

(*iii*) In cases where there is a doubt as to whether the International Law has been abrogated by the Municipal Law, the presumption that legislature did not intend to override the International Law will apply.

It will thus appear that Municipal Courts when unrestricted by statutory limitations apply and enforce rules of International Law as part of the law of the land. The American tendency is clear from the decision of Mr. Justice *Gray* in the *Paquete Habana* case where it was observed.

'International Law is part of our law, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or

1. Law of Nations by Brierly at P. 84.

legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.'[1]

Practice on the Continent.—The general attitude of the continental countries is to regard customary International Law as part of the law of the land. After the First World War there arose a trend in Europe to incorporate principles of International Law into Municipal Laws.

German Practice.—Even before the First World War the attitude of Germany was to regard customary International Law as part of the German Laws. The German Constitution of 1919 in Article 4 provides that 'the universally recognised rules of International Law are valid as binding constituent parts of German Federal Law.' But this rule has not always been followed and there are cases where a rule of German Federal Law contrary to International Law was followed. An example of the violation of Article 4 is furnished by the *Reparations Levy* case in which the German *Reichsgericht* held in 1928 that notwithstanding Article 4 of the Constitution it was bound to apply a statute which was contrary to the Treaty of *Versailles*.[2] During the National Socialist regime German trend was to allow a restricted application of article 4 and to regard as binding only those rules of International Law which had been consented to by it.

French Practice.—French practice is in favour of treating customary International Law to be part of the French Law unless there is a conflict between the statute or Constitutional Law. French Law requires that treaties to be binding are to be formally promulgated or published. Although the French Courts sometimes refuse to apply the rules of International Law arising from treaty in reference to the statutes the general trend in France is to respect treaty and to regard it as the law of the land.

Belgium and Poland—These countries too regard customary International Law as part of the law of the land. Treaties to be the law of the land require to be approved or enacted by the legislatures. In these countries the courts will apply the law laid down in a treaty only when the national legislature has either given its assent or has transformed it into a national enactment.

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1. 175 U. S. 677.
2. Annual Digest 1927-1928 Case no. 225.

Norway.—While customary rules of International Law are regarded as part of the law of land the treaties do not *per se* operate to supersede State Law. Treaties to be binding must be converted into legislative enactments.

Austria.—The Austrian Constitution in Article 8 recognises the validity of the recognised rules of International Law. The Austrian trend is to regard customary International Law as part of the law of land.

Spain.—The Spanish Constitution also provides that recognised rules of International Law are part of the law of the land.

Practice of the Latin American States.—The general view of these States is that the essential principles of International Law should be incorporated into Municipal Laws. Many American States have laid down in their constitution that International Law is part of the law of the land. Generally States follow the practice of Great Britain and the United States.

Indian Practice.—India is a sovereign Democratic Republic, burdened with the obligations of the International Law. One of the directive principles embodied in Article 51 of the [redacted] India shall endeavour to promote International peace and security, maintain just and honourable relations between nations, foster respect for International Law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of International disputes by arbitration. This directive principle indicates that rules of International Law whether customary or conventional that is to say, arising out of treaties would not be violated but would be respected. Art. 253 of the Constitution empowers the Parliament to make any law for implementing any treaty agreement or convention with any other country or countries or any decision made at any International Conference, association or other body. Considering the directive principle along with this article (253) it appears clearly that while there is a power to make laws in respect of treaty obligations, there is no separate provision to make laws in respect of existing customary rules of International Law. The Indian Parliament, has power to make laws to give effect to* the rules of customary International Law. Article 253 embodies a rule which is different from that which prevails in America where a treaty between America and foreign Country becomes itself the law of that country without an Act of the Congress.

The Indian Constitution has no such provision as finds place in the constitution of the United States of America.

These provisions in the Constitution amply justify the view that Indian Courts will follow the British practice in this respect. The directive principles, embodied in Article 51, the obligations under the International Law and the absence of a provision like the one in the American Constitution coupled with a power to make laws for implementation of the treaty clearly indicate that India is to follow the British Practice. As a matter of fact the Supreme Court and other courts in India are following the British practice in the matter of application of existing rules of International Law. In the case of *Viswadan Singh* v. *State of Uttar Pradesh*[1] before the Supreme Court the question was about the post-Constitutional rights to property situate in Indian States that were not part of British India before the Constitution but which acceded to Dominion of India shortly before the Constitution and became an integral part of the Indian Republic after it. The Supreme Court discussed the principles of International Law on the point and agreed with the view taken by the British Courts and Jurists that the Municipal Courts were not entitled to enquire into 'Acts of State' but held that there was no 'Act of State' and that the State had no right to deprive the petitioner of the rights which he possessed before the Constitution. In another case *State of Madras* v. *Raja Gopalan*[2], the Supreme Court was called upon to decide whether the services of a civil servant appointed by the Secretary of States for India before 15th August 1947 stood automatically terminated on the creation of a sovereign Republic and whether the contract of service between the Secretary of States for India and the civil servant came to be terminated on the Secretary of State ceasing to have control in respect of the services. The Supreme Court relying upon the authorities of Privy Council and the House of Lords held that the services of the civil servant as well as the contract of the service came to an automatic termination on 15th August 1947. Although this case was decided on the language of the Indian Independence Act and the subsidiary Legislation which followed yet the rules of International Law relevant to the question were pleaded before it. The Supreme Court did not feel disposed to look at the matter from the point of view of International Law but it also did not express an opinion that the rules of International Law were not binding on it. The Pepsu High

1. A. I. R. 1954 S. C. 447.
2. A. I. R. 1955 S. C. 817.

Court[1] considered the question relating to obligations of the successor State with regard to private property of private individuals. This matter arose out of an Income-Tax Reference. The High Court after a review of a number of cases decided by the Privy Council came to the conclusion that the law made after this accession abrogating the agreement between the ruler of Jind and assessee was valid. It was also held :

> "The principles of International Law as enunciated by various authorities do not insist on their whole-sale recognition by conquering or annexing State. In any case legislation otherwise validly made and promulgated by the new State cannot be regarded as invalid or inoperative merely because it is not in consonance or contravenes such supposed principles of International Law and no relief on that account can be granted by the Municipal Court to persons adversely affected thereby. The contention of learned counsel also must therefore fail."[1]

Again the Calcutta High Court in the case of *Indian National Steamship Co.* v. *Maux Faulbaum*,[2] had to apply certain principles of International Law. The petitioner was the Republic of Indonesia which had purchased fifty-one reels of cable from a merchant at Hamburg and shipped them for carriage on a vessel to Djakarta. The vessel carrying these goods changed its route and came to Calcutta where the entire cargo was unloaded. The petitioner claimed immediate possession of goods. One of the questions raised was whether the foreign Government was immune from proving its title to the property. The High Court after considering a number of authorities came to the conclusion that the immunity does not extend to cases where the property in dipute is in the possession of a third person and therefore it was necessary for the petitioner to prove its title.

The Calcutta High Court in the case of *Sri Krishna Sharma* v. *The State of West Bengal*, considered the effect of Anglo Tibet Trade Regulations of 1914 on the subsequent law of the land which was in conflict with the regulations. The High Court assuming that the Anglo-Tibet Regulations was a treaty and constituted law came to the conclusion that the Municipal Courts were bound to give effect to the statute even though it conflicted with International Law. It observed :

"The language of the Indian statutes is clear enough :

1. *Dalmia Dadri Cement Co. Ltd.* v. *Commr of Income Tax*, A.I.R. 1955 Pepsu 3.
2. A. I. R. 1955 Cal. 491.

in the interests of India they seek to put restrictions in the way of trade between Indian and other countries. If that language be in conflict with any principle of International Law as is said to be deducible from the implied provisions of Anglo-Tibet Trade Regulations of 1914, Municipal Courts of India have got to obey the laws passed by the lagislature of the country to which they owe their allegiance. In interpreting and applying Municipal Law, these courts will try to adopt such a construction as will not bring it into conflict with rights and obligations deducible from rules of International Law. If such rules, or rights and obligations are inconsistent with the positive regulations of Municipal Law, Municipal Courts cannot override the latter. It is futile in such circumstances to reconcile, by strained constructions what are really irreconcilable."

These cases lay down that the courts in India are prepared to apply rules of International Law in the absence of a statute to the contrary, that they will not question 'an Act of the State', that they cannot enforce the terms of a treaty between India and a foreign country and that they will adopt such a construction of an Indian Act as may not bring it into conflict with a rule of International Law. If the present is any indication of the future it will be safe to say that India fully agrees with the British practice.

Soviet Practice.—The legal ideology that prevails in Russia and that forms the basis of the Government is inconsistent with the principles implicit in the monistic theory stated above It is clear that Russia is also subject to the obligations of International Law as other States. It is not possible for it to disobey the rules of International Law. It is not doubt true that the will of the State is supreme and the laws of the land have supremacy. The rules of customary International Law must be deemed to have been assented to by the Soviet State, but they do not by this implicit consent become law of the land. The courts in Soviet Russia cannot give effect to rules of International Law unless their exists some law of the State embodying that rule. In this view of the matter International Law is not the law of Russia unless it is incorporated by the State in its laws.

Conflict between National and International Practice of International Courts.—The attitude taken by international judicial organs has been to uphold the supremacy of the

International legal order and to greatly reduce the conflict between the national and International Law. An indirect method has been adopted by International Courts for the enforcement of the rules of International Law and for bringing Municipal Laws in conformity with International Law. These courts have never failed to insist upon the observance of rules of International Law and have always proclaimed the overriding character of such rules. They follow a procedure which is calculated to reduce the conflict.

In the case regarding certain *German Interests in Polish Upper Silesia* (1926) the Permanent Court of International Justice expressed the view thus : "From the standpoint of International Law and of the court which is its organ, Municipal Laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The court is certainly not called upon to interpret the Polish law as such ; but there is nothing to prevent the court's giving judgment on the question whether or not in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention." This view clearly shows that the rules of International Law are to prevail in judging the actions of State. The Permanent Court of Arbitration in the case of *North Atlantic Coast Fisheries* laid down the rule that the exercise of sovereign power was subject to the obligations of the treaty the terms of which were to be complied in good faith. The same court in the case of the *Norwegian Claims* against the United States of America ruled that "should the public law of one of the Parties seem contrary to international public policy, an International Tribunal is not bound by the Municipal Law of the States which are parties to the arbitration." This rule makes it obligatory on States to bring their laws in conformity with International Law. Another important case in which the Advisory Opinion of the Permanent Court of International Justice was sought is that of the Exchange of Greek and Turkish Populations. In this case the Danzig Constitution which had been prepared with the aid of the League of Nations was pleaded in support of the violation of the obligations under the International Law. The Permanent Court of International Justice rejected the plea and observed that "In cases of such a nature it is not the constitution and other laws as such but the international obligation that gives rise to the responsibility of the United States." In yet another case of the treatment of *Polish Nationals and other persons* of Polish origin or speech in the Danzig Territory in which in giving its

advisory opinion the Permanent Court of International Justice declared : "That, while on the one hand according to generally accepted principles a State cannot rely as against another State on the provisions of the latter's Constitution but only on International Law and international obligations duly accepted, on the other hand and conversely a State cannot adduce as against another State its own Constitution with a view to evading obligation encumbent upon it under International Law or treaties in force."

The above cases illustrate the attitude of the International Judicial Organs in upholding the supremacy of International Law. The Permanent Court of International Justice has laid down rules which go along way in doing away with the theoretical discussions about the various theories as to the relationship between the National and International Law. *Schwarzenberger* summarises the principles developed by the court thus[1] :—

"Firstly, a State is estopped from pleading before the court that the non-fulfilment of its international obligation or the violation of an international treaty is due to its constitution or to act or omissions on the part of its legislative, judicial and administrative organs or of any self-governing body under its control.

Secondly, the provisions of Muncipal Laws cannot prevail either over the obligations of a State under International customary Law, including the minimum standards of International Law or over its obligation under international treaty law.

Thirdly, a State which has contracted international obligations is bound to make in its Municipal Law such alterations as may be necessary to ensure the fulfilment of its international obligations.

Fourthly, a violation of International Law does not cease to be so because the State applies the same measures to its own subjects.

Fifthly, the evasive form of a measure under Municipal Law is irrelevant if in fact it amounts to a violation or non-fulfilment of an international obligation.

Sixthly, a measure of municipal character which endangers treaty rights of other States is a violation of an international obligation.

1. Schwarzenberger :—International Law Vol. I p. 21-22.

Presumption of Law.—There are certain presumptions of law which courts are enabled to draw in order to avoid possible conflict between the Municipal and International Law. They may be stated as follows :—

(*a*) There is a presumption that a municipal law of a State is not in conflict with International Law. A municipal law should be so interpreted as may not come in conflict with International Law.

(*b*) In the absence of express provisions in municipal laws with regard to International Law it must be presumed that the rules of International Law are implicitly embodied in the municipal laws of the State.

(*c*) It must be presumed that the State has not refused to exercise rights allowed by the International Law.

Conclusion and Suggestions.—A survey of the theories and the practice obtaining in various countries will show that the relationship between the international and municipal laws of the State is one of inter-dependence. The reason for this inter-dependence is obvious The State as corporate body simply by reason of the Statehood is answerable for any violation of international obligations and it is not permitted to plead in defence that its municipal laws being in conflit with International Law caused the violation complained of. It is, as already stated, bound to make reparations for that violation diplomatically. Inspite of the violations of the international obligations under the municipal laws of the State, the international obligations remain intact to be discharged by the State. The wrong within the territories of the State has to be remedied and a modern State has no escape from this position. The logical couclusion would, therefore, appear to be that both the systems of law, one within the State and the other outside the State are imperative in the sense that the State is bound by them and it is not in a position to ignore any one of them. This conclusion is in favour of the view that the two systems are only two phases of a single legal order which must prevail. The Monistic theory of law must be accepted.

In view of what has been said and of the serious consequences that sometimes flow from the violation of international obligations a modern State cannot afford the existence of a

conflict between its municipal laws and the International Law. It is, therefore, suggested that :—

(*a*) the States by their conduct, diplomatic or otherwise or by their express laws must accept the priority of International Law.

(*b*) the States should frame their laws in such a manner as to give effect to the treaties entered into by it with foreign States.

(*c*) the Municipal laws should contain a provision as to the overriding nature of International Law.

(*d*) the States should adopt the principle that a treaty will have the effect of abrogating all previous laws repugnant to its terms.

(*e*) the States should recognise the validity of customary International Law and should try to bring its own municipal laws in conformity with customary International Law.

(*f*) the State's Courts should be authorised to raise legal presumptions against conflict between municipal laws and International Law, to give preference to a rule of International Law in case of conflict and to decide the matter in accordance with the rules of justice and equity in the absence of a clear provision of International Law.

PART II

LAW OF PEACE

CHAPTER VII

STATE AND ITS SOVEREIGNTY

State defined.—The word "State" has acquired a definite meaning in International Law. Some of the well known definitions are :—

Salmond.—"A society of men established for the maintenance of peace and justice within a determined territory by way of force."

Fenwick.—"As understood in International Law, a 'State' is a permanently organised political society, occupying a fixed territory, and enjoying within the borders of that territory freedom from control by any other State, so that it is able to be a free agent before the world."

Oppenheim.—"A State proper—in contradiction to colonies and Dominions—is in existence when a people is settled in a country under its own sovereign Government."

Montevideo Convention.—According to Montevideo Convention of 1933 signed by the United States of America and some Latin American States the essential features of a State in International Law are :—

(*a*) a permanent population,

(*b*) a defined territory,

(*c*) a government, and

(*d*) a capacity to enter into relations with other States.

In view of the above it would appear that a group of people living in a specified area having a government and possessing uncontrolled power to have dealings with other countries of the world constitutes a State under the International Law.

Lawrence.—"A State may be defined as a political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey."

Pitt Cobbett.—According to him for the purposes of International Law a State denotes "not merely an organized community but an organized community possessing certain qualifications which are deemed essential to the maintenance of international relations." He describes State as "a people permanently occupying a fixed territory; bound together into one body politic by common subjection to some definite sovereign authority; exercising through the medium of an organized Government a control over all persons and things within its territory; and above all capable of maintaining relations of peace and war with other communities."

Requisites of a State.—The term 'State' is not to be confused with the term 'nation' which generally means a group of people of the same race, religion, language and historical traditions. These two terms are not inter-changeable for a nation may not be a State as to be subject of International Law. The term 'State' in International Law has a definite meaning. The requisites of a State in International Law are:

Firstly, there must be a group of people so large in number as may 'maintain and perpetuate itself.' It is necessary that there must be a permanent population. A group of people united for a definite purpose would constitute permanent population.

Secondly, there must be a defined area of land or a fixed territory occupied by the group of people constituting permanent population.

Thirdly, there must be a Government maintaining law and order over the group of people throughout the territory occupied by it.

Fourthly, there must be a capacity to enter into relations with other States. This is an important qualification which must be possessed. A politically organized society of people inhabiting a fixed territory in order that it may be a State in International Law must have its own distinctive association with the other States in international society. The association of one State with the other is generally evidenced by treaties entered into between them. The capacity to enter into relations with other States is possessed by a politically organized society only when it has reached a stage in civilization where it is capable to shoulder international obligations and to observe the rules of conduct prevailing among other States. A group of people even though politically organized inhabi-

ting a fixed territorry, if backward in civilization is not fit to have relations with other civilized nations and cannot be said to constitute a State in International Law. It is the capacity to observe the rules of International Law and to discharge International obligations that constitutes the standard of civilization to be attained in order to become a State.

2. Community of States.—The family or community of nations owes its existence to Christians ideals of unity. The concept of community of nations prepared the ground for the rules of conduct for the States. It was the creature of necessity in those days when Christian States formed themselves into a united group for the purpose of mutual help and for defending themselves against non-Christian States with which they were generally at war. The original members of this community were those European States who had signed the Peace of Westphalia and for hundreds of years this family consisted of only Christian States. In 1721 Russia joined the group and was followed by the new American Republic. Thereafter other American States came within the folds of this community but the real progress began with the inclusion of Turkey as a member at the Pact of Paris in 1856, for it was then recognised that the family of Nations could not be confined to only Christian States. At the beginning of the nineteenth century States like Japan, Spain, China and Persia were members of the family. After the first world war Baltic States, Egypt and Arab States were also recognised as members. India too attained a qualified membership. The League of Nations which was intended to be a body of all the States of the world did not supersede the family of Nations which was already in real existence then. The failure of the United States of America to join the League and temporary absence of other States had the effect of keeping the original family intact along with the League.

The two institutions *viz.* the League and the Family of Nations continued to exist side by side till the second world war. The United Nations Organization coming into existence at the close of the second world war has now taken the place of the Family of Nations. The old tests of civilizations for membership of the Family of Nations are no longer to be applied by the United Nations Organization which is open to all the States which agree with the aims and objects of the Charter.

3. Sovereignty.—The term "Sovereignty" originally stood for the "Highest Power." It was in the seventeenth

century that the Political concept of sovereignty was developed by *Bodin*. According to *Bodin* the term 'sovereignty signifies that highest and absolute power in the State which is uncontrolled in any manner except by law of God and of Nature. The sovereignty in State consisted in that power which was supreme within the State and which was not restricted by any man-made law and to which all individuals in the State owed obedience. *Bodin* was mainly interested in securing supreme power for the monarch. To him law was the expression of the will of the monarch from whom all law emanated. He denied custom to be the source of law. *Brierly* observes : " In the form in which *Bodin*, propounded the doctrine of sovereignty it raised no special problem for the international lawyer. Sovereignty for him was an essential principle of the internal political order and he would certainly have been surprised if he could have foreseen that later writers would distort it into a principle of international disorder, and use it to prove that by their very nature States are above the law."[1] Following *Bodin* came the political theory of sovereignty enunciated by *Hobbes* who maintained that sovereignty was essential to a State and that sovereign power was unlimited, illimitable and indivisible. To *Hobbes* a sovereign was above all things temporal or spiritual. Some jurists of whom *Purfendorf* was the most prominent, maintained that although sovereignty was indivisible it could be constitutionally limited.

In the eighteenth century the theory of indivisibility of sovereignty began to weaken and it was felt that sovereignty could be shared by two or more persons. This controversy as to whether sovereignty was or was not indivisible continued throughout the nineteenth century also. The omnipotence of sovereign was however maintained all along. The twentieth century saw a new concept of sovereignty for it was realised by jurists that sovereign power in the sense of uncontrolled supreme power offered a huge impediment to the development of public International Law and that the old theory did not satisfy the requirements of the times. It was felt that International Law to be effective must control the actions of the sovereign in a State in the same way as the law of land controlled the freedom of an individual.

With the growth of International Law the theory of sovereignty as propounded by *Hobbes* and others who followed him has considerably weakened. It is now fully recognised that sovereign power residing in a king in the case of a

1. Brierly : The Law of Nations, p. 10-11.

monarchy or residing in the people in a democracy is controlled by and is subject to law and the old notion of sovereignty is to be discarded. It is not now disputed that International Law whether based on custom or treaty puts a restriction on the independence of a State. The restrictions placed by International Law affect both the internal and external independence of the State. A State is not now free to deal in any way with another State, for the rules of International Law regulating its conduct must be obeyed by reason of its statehood and this clearly amounts to restriction on external independence of a State. In the same way, a State of the modern times does not enjoy full internal independence and cannot deal with individuals within its territory in any manner it likes, for the rules of International Law provide for treatment to the foreigners within a State and the Charter of the United Nations Organisation insists on States to respect " Human rights and fundamental freedoms." Thus, it is not possible for a State to deal either with its own citizens or foreigners within its territory in the way it likes. The old theory of sovereignty has been fully exploded and there does not now exist a sovereignty that is indivisible, unlimited or illimitable.

CHAPTER VIII

STATE SOVEREIGNTY IN INTERNATIONAL LAW

Modern meaning of sovereignty in International Law.– The theories enunciated by *Bodin* and *Hobbes* placed sovereignty above law and led the use of the term 'sovereignty' to mean an absolute and unrestricted power—a power supreme in all respects. These theories contemplated freedom from control and did not expressly admit limitations on sovereignty. By their nature these drastic theories were incompatible with the basic principles of International Law which imposes restrictions on sovereignty and independence of States. The rules of International Law impose obligations on a State and therefore control the sovereignty and independence of the State. *Brierly* notices this incompatibility and observes :

> "The doctrine was developed for the most part by political theorists who were not interested in, and paid little

> regard to, the relations of States with one another, and in its later forms it not only involved a denial of the possibility of States being subject to any kind of law, but became an impossible theory for a world which contained more States than one."[1]

The incompatibility of the concept of sovereignty as developed by *Bodin* and strengthened by *Hobbes* with the existence of International Law was sought to be removed in a number of ways. The problem before the thinkers was as to how the State sovereignty could be treated to be subject to International Law which commands obedience and how that concept could co-exist with the principles of International Law. The concept of sovereignty was sought to be rendered compatible with the rules of International Law by explaining that International Law was a law 'between' and not 'above' nations. This explanation cannot hold good for the simple reason that if States are bound to obey International Law, they must be regarded to be subject to that law and the law must surely be above the State and not between them. A reconciliation of the concept of sovereignty with the principles of International Law was sought to be brought by a theory known as 'Self-Limitation-Theory.' This theory or 'Auto-Limitation Theory' assumes that the State is endowed with the supreme power and a will giving expression to that supreme power and argues that the sovereign will of the State voluntarily in the interests of the State yields to the injunctions of the International Law. The subordination of States to International Law is explained on the ground of State's own volition. Such a theory in essence means that it is the State alone that can limit its sovereignty, and may justly be said to follow the doctrine of self-limitation of the State propounded for the first time by *Jellinek*. *Jellinek* attempted to tackle the problem of incompatibility of the concept of sovereignty with the international legal order by advancing a theory according to which the State consents to observe the rules of international order and thus places limitations on its own sovereignty. Certain variations to this theory were suggested by some writers but the main idea underlying them was that State was subject to International Law because it has so willed Prominent among those who in effect followed the doctrine of self-limitation of State-sovereignty though in a different manner are *Anzilotti* and *Triepel*. *Anzilotti*, an Italian jurist and later Judge of the Permanent Court of International Justice explained the binding force of International Law on the principle known

1. Brierly : The Law of Nations p. 46-47.

as *Pacta Sunt Servanda* meaning that a 'contract has to be kept'. To him treaties are binding on States on the ground that they have agreed to be bound by them while customary rules of International Law are binding because there is an implied consent of the States to be bound by them. *Triepel* traces the obligatory force of International Law from the Vereinbarung or agreement of States to become bound by common consent.

The broad theory of self limitation or the auto-limitation theory briefly noticed above is wholly unconvincing in the face of facts in the international order. The difficulty in this way of thinking arises from the fact that the State is taken for granted to be endowed with sovereignty or supreme uncontrolled power. If there is in fact such a sovereignty, the principle of obligation under the International Law cannot be explained at all. The auto-limitation theory is unable to render the concept of sovereignty compatible with the principles of International Law. If the obligations of International Law are self-imposed, that is to say, they have been willingly shouldered by the States, it is open to the State to cast off the burden of such obligations any time it likes. But it is not possible for a State in the modern times to feel itself free to act in any matter in violation of the rules of International Law. The exigencies of the modern international life obliges a State to feel bound by the rules of law and it is not true that it has an option in this matter. A self-imposed restriction is no restriction in reality and if a State wills to be bound by the obligations of the law, it does not really make itself subject to those obligations. It is a fact that can hardly be denied that the rules of International Law have their own binding force and do not depend upon the consent of the States for their validity and efficacy.

It is therefore of utmost importance that the original definition of 'sovereignty' as formulated by *Bodin* and his followers may be modified, for it is not possible today for any State to evade in excercise of its absolute sovereignty the rules of International Law The obligations of International Law have become fastened on State by force of the circumstances peculiar to the modern times and a revision of the definition of sovereignty is urgently called for. A State is but a part of the great international community and the law and the order in the international community cannot be maintained if it insists upon its uncontrolled supreme power. It has to recognise and safeguard the interests of the international community of which it is a part. In order to maintain law and order in the international community it has to subject

itself to the limitation of the law of the community. The sovereignty of a State is subject to the rules of International Law in asmuch the same way as an individual who is subject to the law of the country to which he belongs. *Kelsen*, states the position thus :

> " The authority of International Law or what amounts to the same, the authority of the international community is established above the States just as the authority of the national community of the State is established above the individuals If the so called sovereignty of the State is considered as compatible with International Law, it can mean only, as pointed out, that a State in the sense of International Law is legally subjected only to International Law customary, general or conventional particular International Law and not to the national law of another State."[1]

The concept of sovereignty is therefore to be revaluated in the light of the international legal order which commands and enforces obedience. The question whether or not sovereignty is inherent in the nature of a State is not material, for if a State is subject to International Law its sovereignty whether inherent or otherwise would be limited. A State, subject to the obligations of the law, cannot be said to possess sovereignty in the sense of uncontrolled supreme power. The sovereignty of a State in modern times would not be uncontrolled but will be restricted by the rules of International Law. It would be proper to define 'sovereignty' as that supreme power which a State can exercise consistently with the rules of international character. Sovereignty is therefore supreme power of a State subject to the limitations imposed by International Law.

Fenwick also observes :

> " It is clear that if the term 'sovereignty' is to continue in use it must be understood in a manner consistent with maintaining law and order in the international community. State must yield once and for all the right to be judge in their own case and the right to take the law in their own hands; they must recognise the higher right of international community, acting through its appropriate organs, to protect the peace of the community and to remove the causes of dissent that lead to acts of violence. Unless the sovereignty of the State can be brought within these limitations the United Nations cannot possibly attain the objectives set forth in the Charter."[2]

1. Kelsen : The Principles of International Law p. 156.
2. Fenwick : International Law (3rd Edition) p. 42.

Sovereignty and independence.—Independence is an aspect of sovereignty of a State. It is an attribute of a State. A State enjoys independence in the sense that no other State can exercise any control over it. Sovereignty and independence go together, so that if a State is sovereign it is independent. According to *Lawrence* "independence may be defined as the right of a State to manage all its affairs, whether external or internal without control from others."[1] Sovereignty implies freedom from outside control. One State has no right to control the actions or to exercise an authority over another State. Each State is free to manage its affairs—both internal and external—consistent with the rules of customary or conventional International Law. It is entirely in the discretion of a State to do what it likes within its territory and behave with other States in any manner so long as it does not violate any rule of International Law. Independence is logically deducible from sovereignty for if a State is supreme within its territory, it is necessarily immune from any control. On account of being independent a State is entitled to shape its own foreign policy within the limits prescribed by law and to manage its domestic affairs as it sees fit provided it does so in accordance with the rules of International Law. An individual State has the right to give itself any constitution that pleases it and passes any law for its subjects and no other State has any business to interfere in its affairs.

Schwarzenberger states, "Independence is an essentially negative conception. It implies the absence of an over-riding authority and freedom from interference. Independence may be understood to limit International Law in the sense that, if International Law would limit independence then international law has to give way. Such an anarchic interpretation of the term is the negation of any legal system. Or, independence may mean that States have a right under International Law to be free from outside interference to the extent to which International Law does not limit such freedom."[2] The independence of a State does not entitle it to freedom from law but to freedom from any outside interference. The right of a State to independence implies a duty on other States not to interfere or exercise any control over it. It is thus a rule of International Law that a State shall respect the independence of another State. The limitations on independence of a State are those of the rules of International Law. Sovereignty and independence of

1. Lawrence : The Principles of International Law p. 115.
2. Schwarzenberger : International Law Vol. I p. 45.

a State are subject to the obligations under International Law.

The independence of a State has two important aspects in accordance with the two spheres of State activities. State exercises its sovereign power within the limits of its territory; it also exercises that power in its relations with other States. The supremacy that a State exercises within its territory is termed territorial supremacy while that which it exercises in its conduct with other States is known as personal supremacy. In terms of independence the freedom from control that a State enjoys in matters of territorial supremacy is internal independence while that which it enjoys in matters of personal supremacy is external independence. It is in enjoyment of internal independence that a State is a complete master of all situations within the territory. The internal independence enables the State to govern its territory in any manner it likes, to frame laws with respect to property, and persons present on its territory, to prescribe conditions of citizenship, and of admission of aliens to its territory and to regulate economic, social and cultural activities without any interference by other States. In all these activities the freedom of the State is subject to treaty obligations if any and to the obligations under the general International Law. The external activities of a State arise from its contact with other States and constitute the primary qualification of an international personality. A modern State is constantly in touch with the other States and this mutual inter-course results in numerous engagements. Common commercial, economic and social interests have brought all the States closer. In enjoyment of its external supremacy a State maintains its supremacy over its subjects abroad, manages its affairs in relation to other States, enters into treaties with other States, sends and receives envoys, acquires and cedes territory, and makes war and enters into special engagements. A State is free to determine the nature of relations that it is going to maintain with other States. The freedom in such activities is subject to the obligations imposed by International Law.

Restrictions on internal independence.—A harsh and arbitrary treatment by a State of its nationals may not strictly amount to a breach of International Law, but it has its own reactions on foreign States and this reaction is bound to have its own results. A State in the modern set-up cannot have any amount of contempt for the sensibilities of foreign people, for the international order rests on good will of all nations. The treaties after the second world war concluded between the Allied Powers and the Satellite States contained specific provisions for the

protection of the interests of all persons residing within the jurisdiction of the Satellite States. These treaties unmistakably show the general anxiety about the welfare of individual as such.

The internal independence of a State does not authorise it to adopt a discriminatory course of action within its territory. A State is free to refuse to admit all aliens into its territory, but it cannot admit a national of a particular State into its territory and refuse admittance to the national of other States. Such an action if taken would be discriminatory and is not permissible. Similarly, expulsion of aliens cannot be discriminatory. A State cannot expel the national of a foreign State indiscriminately. Arbitrary and discriminatory expulsion is liable to result in protest and reparations. Discrimination is also not permissible in matters of civil privileges granted to foreigners. Moreover a foreigner must be granted the same civil privileges as the national. A State cannot deny civil privileges of a national to an alien. The political rights may not be conceded to an alien but he is entitled to all civil privileges. That law which is likely to lay the State open to a charge of unfaithfulness to an International obligation cannot properly be passed The treaties which a State has entered into operate as a check on its legislative function. The customary rules of International Law similarly affect the legislation of a State. A State has also to be careful of the treatment of its nationals. Apart from the restrictions imposed by the Charter a State is not free to treat its nationals in a manner shocking to the sense of humanity, for such a conduct will evoke protests of other States. *Hyde* observes: "Even when no treaty is concerned, the harsh or arbitrary treatment of a national may directly affect the well-defined interests of a foreign State. The question presents itself, therefore, whether when such action produces such an effect, it violates also an obligation of International Law towards that State, and is to be dealt with accordingly. Secretaries *Blanie*, *Gresham* and *Hay* did not hesitate to declare that rigorous measures applied against their Hebrew nationals by Russia and Roumania, forcing a numerous class of destitute persons to emigrate to the territory of the United States, affected adversely the interests of the latter, to a degree sufficient to warrant its protest".[1] Recently the Charter was invoked by India when it complained to the General Assembly of the treatment of people of Indian origin in the Union of South Africa in 1946. India protested on the ground

1. **Hyde : International Law vol. I p. 210.**

that the Union Government had enacted discriminatory legislation against Indians. Similarly India along with a number of States complained to the General Assembly about the race conflict in South Africa resulting from the policy of apartheid.

A State does not possess liberty of action in matters over which it exercises territorial supremacy. A State has full jurisdiction over its territory. This jurisdiction is subject to customary International Law which requires that a State has to allow passage to foreign merchant-men through its maritime belt. Similarly international water-ways are open to navigation by all merchantmen. The independence of a State with regard to its territory is subject to the right of other States to a passage of their merchant-men through its maritime belt. Foreign monarchs, envoys, foreign men-of-war and foreign armed forces on the territory of a State are immune from the jurisdiction of the State which owns the territory. The principle of ex-territoriality operates in such cases and the liberty of action of the State is subject to this principle. A State has also no right to treat foreigners on its territory in an arbitrary manner. There is no duty cast on a State to admit aliens into its territory but when it allows them to stay on its territory it must give them a decent treatment. In case the treatment is not decent, the State whose national the individual is, in exercise of its personal supermacy can demand reparation of the injury caused by such a treatment. A State is not free to make alterations in national resources of its territory in a manner prejudicial to the neighbouring State. It cannot stop the flow of a river passing from its territory to the neighbouring territory. The territory of a State cannot be used to raise an armed force against another State.

A State enjoys the right to enact such laws as it considers proper. But this right is again subject to its obligations under the International Law.

General limitations on sovereignty and independence: The limitations on sovereignty and independence of a State are those which are imposed either by treaty or by General International Law. They concern the internal and external activities of a State and extend to its internal and external independence. The liberty of action both with regard to its domestic and foreign affairs, is not at all boundless but is restricted by the rules of International Law. Every treaty that a State enters into, operates to place limitations on its sovereignty and independence. Similarly, a rule of customary International Law means a restriction. The external independence under the United Nations has been restricted so that a State

cannot employ force in the settlement of its disputes. The Charter of the United Nations has also imposed limitations on the internal independence. Even in the matter of the constitution of a State, there operates a restriction as is apparent from the complaint of Poland to the Security Council in 1946, that the Franco regime was a threat to international peace and security. The Constitution of a State is not to be such as may be a danger to International peace and security. Every State is responsible for the peace and security in the international order and it cannot shape its constitution on fascist lines. In the treatment of its nationals its freedom is restricted by the obligations of the Charter which insists upon the promotion of 'human rights and fundamental freedoms'. A State must not therefore deny human rights and fundamental freedoms to its own subjects and must not persecute any section of it subjects in a manner inconsistent with the principle of human rights. The Charter of the United Nations, numerous Conventions on varied subjects which lay down general International Law and many bilateral and multilateral treaties of all kinds operate to restrict the sovereignty and the independence of a State in the modern world. Besides these customary International Law places many a limitations both with regard to internal and external independence.

The external independence is also hedged in by a number of limitations. The rules of customary International Law require a State to maintain diplomatic intercourse with other States. It cannot have the freedom of severing diplomatic relations with other States. There is of course no legal obligation on a State to accept or adhere to a treaty. But this freedom is also nominal for the dissenting State is more often pursuaded by the opinion of the majority of States to accept the treaty or to be in practice subject to the obligations under treaty.

A State exercises personal supremacy over its nationals abroad, but in exercise of such supremacy it cannot act in a manner as may come in conflict with the territorial supremacy of the foreign State. External independence of a state will not permit it to violate the territorial supremacy of the foreign state. A State therefore, cannot require such acts from its nationals present on the territory of a foreign State as may amount to violation of the Municipal Law of the foreign State.

It may also be noted that a State has no freedom of action in an important sovereign activity, namely, of waging a war. The Charter of the United Nations has, at least,

theoretically taken away the traditional independence of egaging in a war with other States.

Sovereignty and independence before Law.—The International Courts and Tribunals have always recognised sovereignty and independence of a State. They have regarded these rights as forming a corner-stone of the existing system of International Law. The Permanent Court of Arbitration in the *Palmas Case* (1928) dealt with the concept of sovereignty and independence of a State at some length in order to decide the question of title involved in the case. It observed :

> "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State...... Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so called national frontiers as recognised by International Law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions or by acts of recognition of States within fixed boundaries."

It further remarked :

> "International Law, the structure of which is not based on any super-State organisation cannot be presumed to reduce a right such as territorial sovereignty with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations."

The Permanent Court of International Justice in the case of status of *Eastern Carelia* (1923) dealing with the provisions of Article 17 of the Covenant observed : "This rule, moreover, only accepts and applies a principle which is fundamental principle of International Law, namely, the principle of the independence of States. It is well established in International Law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration or to any other kind of pacific settlement."

The right of independence because of the importance of its concept under the International Law is a matter of presumption. The party in litigation which pleads any limitation on the right to independence has to displace this presumption by proving that the limitation in fact exists. The Permanent Court of Arbitration in the case of the *North Atlantic Coast*

Fisheries, (1910) was called upon to consider the terms of the Treaty of 1818 between Great Britain and the United States with regard to the right of fishing. The Court in regard to the preliminary question as to whether the right of reasonable regulation resides in Great Britain observed: "Considering that the right to regulate the liberties conferred by the treaty of 1818 is an attribute of sovereignty and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that failing proof to the contrary, the territory is co-terminous with the sovereignty, it follows that the burden of the assertion involved in the contention of the United States *viz.*, that the right to regulate does not reside independently in Great Britain, the territorial sovereign must fall on the United States." The Permanent Court of International Justice in the *Lotus* case also refused to presume restrictions upon the independence of States for it observed: "The rules o law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

Along with the rules of presumption in favour of sovereignty and independence of a State the International Courts have evolved out a rule of restrictive interpretation of the limitations of sovereignty. The courts are not prepared to read into the terms of a treaty a limitation on sovereignty unless the language is clear. The rule that the courts follow is that if it has to choose between two possible interpretations of a treaty it will adopt the one which imposes the least restriction on sovereignty or independence of the State. The Permanent Court of International Justice in the *Mosul Case*(1925) laid down the rule:

> "If the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted. This principle may be admitted to be sound."

The same court in the case of the *Wimbledon* in interpreting the Treaty of Versailles to find out the limitations on the sovereignty of Germany over Kiel Canal observed:

"This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called interpretation would be contrary to the plain terms of the Article and would destroy what has been clearly granted."

Again the Court in the case of the *Free Zones of Upper Savoy and Gex* (1929/1932) emphasized the rule of restrictive interpretation when it observed :

"It follows from the principle that the sovereignty of France is to be respected in so far as it is not limited by her International obligations and in this case, by her obligations under the treaties of 1815 together with supplementary acts, that no restrictions exceeding those ensuing from these instruments can be imposed on France without her consent."

The Court applied the rule 'that in case of doubt a limitation of sovereignty must be construed restrictively. The scope and applicability of the rule as to restrictive interpretation was explained by the Court in the case of the Territorial Jurisdiction of the *Oder Commission* (1929) where in connection with the argument in favour of the rule it said :

"This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results ; there are many other methods of interpretation, in particular, reference is properly had to principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that the interpretation should be adopted which is most favourable to the freedom of the States."

The courts have recognised the principle that the States can by entering into treaties limit their sovereignty and independence and that such treaties are valid as the States in exercise of their rights of sovereignty are competent to enter into such treaties. But they are not inclined to readily spell out a limitation on sovereignty and independence from the text of a treaty which is of doubtful import. The Permanent Court of International Justice in the case of the *Austro-German Customs Union* (1931) had to interpret the terms of the Protocol of 1931

between Germany and Austria whereby Austria had placed restrictions upon her independence. The Court observed :

> "But, although the undertaking given by Austria in this second sentence to abstain from certain acts which might directly or indirectly compromise her independence, refers to the observance of the inalienability of her independence laid down in the first sentence, it does not follow that the acts from which Austria has undertaken to abstain are as a consequence necessarily acts of alienation proper that is, acts which would directly cause her to lose her independence or would modify it as stated above."

The Court further stated :

> "From the point of obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocals or exchanges of notes."

CHAPTER IX

STATE AND ITS RIGHTS

Fundamental rights of a State.—The doctrine of fundamental rights of States owes its existence to the conceptions of natural law. The rights which are inherent in the very nature of a State may be regarded as fundamental rights of a State. Huge controversy centres round the question as to whether a State has rights apart from those which have been recognised by custom or by treaties. Some writers are of the opinion that a State like an individual possesses fundamental rights, that is to say, the rights to existence, to equality, to independence, to respect and to territory. Many jurists, on the other hand, maintain that the distinction between fundamental and non-fundamental rights in International Law is unjustified and that States possess only those rights which the community of States has recognised.

Rivier, the Swiss jurist, in support of the view that States possess certain rights because they are States says thus : "The rights of self-preservation, respect, independence, and mutual commerce, which can all be carried back to a single right of self-preservation, are founded on the very nation of the State as a person of the law of nations. They form the statutory basis of the law of nations, and the common constitution of our political civilization. The recognition of a State as a subject of the law of nations implies *ipso jure* the recognition of its

legal possession of these rights. They are called the essential, or fundamental, primordial, absolute permanent rights, in opposition to those arising from tacit conventions, which are sometimes described as hypothetical or conditional, relative, accidental rights."

In spite of this theoertical controversy both weak and strong States readily accepted the principle of fundamental rights. The weak States favoured the view that State possessed those rights which were essential to their existence. The strong States did not deny the existence of fundamental rights but relied upon them on questions of vital importance. The weak States found a weapon in these funadamental rights to defend themselves against the high handedness of stronger States. This attitude of the States was enough to establish the existence of fundamental rights and it is now recognised that States like individuals have rights which are inherent in them and without which a State cannot exist. These rights though subject to the limitations imposed by the rules of International Law may be stated as :—

(*a*) right to existence and to self-preservation ;
(*b*) right to equality ;
(*c*) right to independence ;
(*d*) right to respect or dignity ;
(*e*) right to territory.

It is however necessary to examine these rights and to find out if they are consistent with the aims of International Law.

(a) **Right to existence and self-preservation**.—That a State has a right to exist and to maintain its existence cannot be denied. It is plain that a State is permitted to violate the personality of another State in its rights of self-preservation. International Law recognises that a State like an individual has a right of self-defence and that acts violating the personality of other States will go unnoticed by International Law if there existed a necessity for those acts. A State in the exercise of its rights of self-preservation can commit acts of violation towards other States only when necessity demands it. The necessity of self-defence as an excuse for acts of violation must be 'instant, overwhelming and leaving no choice of means, and no movement for deliberation.' In the absence of such a necessity a State in the exercise of the right to existence and self-preservation cannot violate the personality of other States. It is for the State to see whether a necessity such as stated above has arisen.

The Charter of the United Nations Organisation recognises the rights of self-defence and requires that measures taken by a State in the exercise of the rights of self-defence must be reported to the Security Council for the purpose of examining their propriety.

(**b**) **Right to equality.**—International Law recognises that all States though politically unequal are equal before the law. The Charter of the United Nations Organisation in Article 2 proclaims that the Organisation is based on the principle of the sovereign equality of all its members. "Equality before the Law means that the law—applying organs in applying the law, must not make a difference which is not recognised by the law, that the law shall be applied as the law intends to be applied."[1] The principle of equality among the States in International Law means that all States have the same rights and the same obligations. "Thus every State has the same 'right to national security and the same obligation to respect the security of another ; every State has the same right to independence, that is, to determine domestic and foreign policies without interference and to exercise jurisdiction without fixed boundaries and the same obligation to refrain from interfering or intervening in the domestic affairs of another State ; every State has the same right to purchase and sell territory, to use freely the high seas, to send and receive diplomatic agents and to negotiate agreements which may be mutually satisfactory."[2]

The doctrine of equality ensures that no State is bound by a new rule of International Law unless it has been expressly or tacitly accepted by it. "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another."[3]

Oppenheim points out the four following consequences of the modern concept of equality of States :—

(1) When there is a question which has to be settled by consent, every State has a right to vote.

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1. Hans Kelsen—Principles of International Law p. 155.
2. Fenwick—International Law (Third Edition) p. 220.
3. The Antelope—Fenwick Cases, 7.

(2) The vote of the weakest and smallest State has as much weight as the vote of the largest and most powerful.

(3) No State can claim jurisdiction over another and therefore although States can sue in foreign Courts they cannot as a rule be sued unless they submit to the jurisdiction of the Court concerned.

(4) The Courts of one State do not question the validity or legality of the official acts of another State.

(c) **Right to independence.**—A State enjoys internal as well as external independence. Its internal independence consists in its freedom of action within its territories. Its external independence consists in its freedom of action outside its territories in its intercourse with other States. Besides this, a State enjoys territorial and personal supremacy The territorial supremacy of a State is understood to mean that a State exercises sovereign authority on all persons and things within its territory. The personal supremacy of a State conveys the idea that a State exercises supreme authority over its citizens inside and outside its territory. International Law recognises the principle that every State has the right to maintain its independence, personal and territorial supremacy and that other States will do nothing to violate this independence, personal and territorial supremacy.

The doctrine of independence leads to the following consequences :—

1. A State is free to adopt any constitution it likes, make such laws as it thinks proper and generally to manage its own affairs in the manner acceptable to it.

2. A State has full liberty in shaping its foreign policy, in concluding treaties, in entering into alliances with other States, in making war or peace and generally in dealing with other States, as it likes.

3. A State in the exercise of its territorial supremacy is free to deal with its own citizens and aliens within its territory in any manner. It has absolute sway and dominion over the properties of its subjects and foreigners lying within its borders.

4. A state in the exercise of its personal supremacy is entitled to retain control over its citizens both inside and outside its territories. Citizens of a state staying outside can

be called back by the State and dealt with in any manner as the State likes.

The right of independence carries with it a corresponding duty to abstain from violating independence, territorial and personal supremacy of other States. A State cannot interfere in the internal affairs of another State. It cannot prevent foreigners from returning to their countries and cannot naturalise them against their will.

Independence of a State is however subject to International Law and cannot be regarded as unlimited. Bilateral and multilateral treaties impose many restrictions on the freedom of States. The Charter of the United Nations Organisation casts an obligation on the States and to adopt a policy of peace in their external dealings and thus places a restriction on the external independence of States. The internal independence, too, finds its limitations in the rules of customary International Law. A modern State is not free to treat its citizens or foreigners living within its territories in any manner it pleases. It is bound to respect 'human rights and fundamental freedoms' and to shape its policy of government accordingly.

Customary rules of International Law have imposed limitations on territorial and personal supremacy of States. A State is required to grant passage to foreign merchantmen through its maritime belt; to respect privileges and immunities of foreign monarchs and envoys, to protect the lives and property of foreigners within its territory and to manage its affairs in such a way as may not lead to any conflict with other States. The rules of International Law casts a duty on the States to prevent the doing of all acts which may be injurious to other States. In the exercise of its personal supremacy a State has to be careful not to violate the territorial supremacy of foreign States. A State no doubt has personal supremacy over its subjects living within the territories of foreign States but it cannot require its citizens to do anything which has the effect of violating the territorial supremacy of the foreign territories where they happen to be. This is based on the rule that a State cannot exercise its supremacy within the territory of another State. A foreigner in a State must abide by the laws of the State and cannot be required to break those laws.

(d) **Right to respect or dignity.**—States like individuals are entitled to maintain their status and position within the community of nations. 'Dignity is a quality recognised by

other States, and it adheres to a State from the moment of its recognition till the moment of its extinction, whatever behaviour it displays'.[1] A State is therefore entitled to be treated with respect by other States and International Law recognises certain ceremonies as evidence of respect paid by one State to the other. A State has a right to demand that their Heads be treated with respect, may not be libelled or slandered, that their envoys be granted extra-territoriality and inviolability when abroad, that their emblems of authority such as flags and coat of arms may not be treated with disrespect. The duty to treat with respect other States lies on the organs of Government of the States and not on the private citizens. But every State in order to 'live together in peace with one another as good neighbours should prevent its citizens from doing anything which may mean disrespect or indignity to other States.

(e) **Right to territory.**—There is no State without a territory and a State has therefore a right to protect its territory. A State is liable to become extinct on the loss of its territories and the right to self-preservation with which we have already dealt embraces in itself the right to protect the territories. The various ways in which territories are lost and acquired will be described later on. Here it is sufficient to say that it is a fundamental right of a State to maintain its territories inviolate. Numerous are the rules of International Law which impose obligations on States to refrain from encroaching upon the territories of neighbouring States.

The Primacy of great powers.--It cannot be denied that States are in fact not equal, for they differ with one another in size of their territory, in population, in wealth, in civilisation and in other respects. The principle of equality means that all States have the same rights and are subject to the same obligations. The doctrine of equality of States has been reaffirmed by the Charter of the United Nations which has for its objective the development of friendly relations among nations based on respect for the principle of equal rights and self determination of peoples. This principle has also been recognised by courts and tribunals. The Permanent Court of Arbitration in the case of *Norwegian Claims* (1922) declared : "Both parties come before the Tribunal on a footing of perfect equality." The Permanent Court of International Justice in the case of *S. S. Lotus* (1927) proceeded on the basis of the principle of equality of States. The British-American Arbitral Tribunal in the case of *David J. Adams* (1921) had no

1. **Oppenheim—International Law. Vol. 1 (Seventh Eddition) p. 251.**

hesitation in applying the "fundamental principles of the judicial equality of States." Chief Justice Marshall of the United States of America in the case of the *Schooner Exchange* v. *MC. Faddan* observed : ' The principle of perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the excercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."

The theory of perfect equality of States implies that all of them are equal before the law. Each State whether weak or strong has the same obligations and the same privileges.

Hyde observes :

> "Indpendent States are equal in the sense that they resemble each other in possessing and enjoying the same privilege of freedom from external control in the management of their domestic or foreign affairs. This a matter of law".[1]

So far as law is concerned the States are equal in that they are possessed of the same rights and are subject to the same obligations. They enjoy equality before law. The Law cannot make any discrimination against them.

As stated earlier the States have favoured the theory of fundamental rights and have always evinced zeal in asserting and claiming these rights. Their actions, however, have not always been in keeping with their professions. Practice differes from theory and the hard historical facts reveal that the principle of equality was not applied by States in their mutual dealings. Since the time of *Vattel* who was responsible for the concept of equality of States there has been at all material times a deliberate disregard of the principle. The powerful nations have always dominated the weak States and succeeded in establishing their primacy in international order. A few historical facts will bear out that the rule of inequality governed the dealings of States and theoretical principle of equality did not find expression in action. After the defeat of Napolean in early nineteenth century the Great Powers (England, France, Austria, Prussia and Russia) became the controllers of the destinies of the other European States. They played with kingdoms and shaped them in the way they liked. They intervened in the affairs of Greece and remodelled that kingdom by 1832. The separation of Belgium from

1. Hyde—International Law Vol. 1 p. 27.

Holland and its neutralization was their work. It will be noted that the Great Powers did not always act in concert but often in order to keep the balance of power they fought among themselves. England and France foiled the attempts of Russia to establish a protectorate over Turkey by going to war (the Crimean War) against Russia. This war ended in a draw at the Black Sea and the Treaty of Paris (1856) was concluded. Later on, in 1878 Russia was again prevented from conquering Turkey by the intervention of the other among the Great Powers. The Treaty of Berlin (1878) was concluded at conference attended even by those who were no parties to the contest.

The Hague Conferences of 1899 and 1907 revealed the mischief of the principle of the equality. These Conferences were organised on the principle of the equality of States. Every State whether small or big had one vote and was entitled to be represented on the committees of the Conference. It was resolved that a Convention was to be adopted ; it was unanimously agreed to in the committees. Every State was equally represented in the plenary session. The Great Powers sponsored the project of judicial arbitration. The smaller States wanted equal representation on the Arbitration Court. This was not approved by the Great Powers and the result was that the whole project which was calculated to be highly useful was wrecked. The principle of equality obstructed the progress of an ambitious plan. *Brierly* in this connection observes :

> "It is desirable that the society of States should become a better organised society than it has been in the past, but it would be obstructive of progress that every State large or small, should claim an equal voice in every new cooperative enterprise. The cry of 'one State, one vote' in the management of affairs which the society of States decides are of general international concern is a quite spurious application of a nominally democratic principles."

The result is no doubt unfortunate but in view of the principles on which the Conference was established the small States were justified in demanding equal representation on the proposed Arbitration Court, although they would have been wiser not to have insisted on the principle of equality. The

1. *Brierly* : The Law of Nations p. 118.

Great Powers had no reason to grudge the just demand for equality, especially in such a case. It is clear that this incident illustrates the disinclination of Great Powers to have much regard for the principle of equality in their actions.

This obstructive principle was disregarded in many a matter concerning establishment of international bodies for advancement of common interests. In the interest of international commerce and communications a number of international unions and associations were set up with the cooperation of large number of States, both big and small, during the later half of the nineteenth century and the period before the First World War. The International Radio Telegraphic Union, the Universal Postal Union, the International Bureau of Weights and Measures, the Bureau of Trade Marks, Copyrights and Patents, the International Institute of Agriculture, the International Opium Commission and the 'International Red Cross, are some of the international bodies which promote common interests of the nations. In many of these equality rule is not observed ; the representation is on the basis of the interest of the State in the service rendered by these bodies. There is also unequal voting in administrative matters of some of these associations. *Schuman* speaking of these organisations observes :

> " In almost every instance the member States, by agreement have in effect surrendered a portion of their sovereignty and transferred power to an international body over what was once a domestic question. In the practical operation of the unions, moreover, the obstructive principles of State equality and action by unanimity have been largely abondoned, with decisions reached by majority vote of the member States."[1]

The political events within a decade prior to the First World War clearly prove the primacy of Great Powers and the ineffectuality of the principle of equality. According to *Fenwick* the situation was : 'The Primacy of the Great Powers exercised under varying circumstances through more than a century had in 1914 became by force of established custom an accepted fact of international relations. It had been exercised chiefly as a means of supplementing the deficiencies of International Law in respect of legislative, executive and ud icial agencies. While the decision taken at the several

1. Scheman : International Politics (6th Edition) p. 210.

congresses and conferences were not binding upon third States it was practically inevitable that other members of the international community should give their implicit assent to them by reason of the power and prestige of the States which laid down the new rule or created the new political situation. Thus the Great Powers succeeded in forming a self constituted governing body whose decrees had behind them a force adequate to secure their observance pending such time as the accomplished fact might come to be part of established order of things." The League of Nations became the mouth-piece of the Great Powers and derived its strength from them. The small States were dealt with by the League in a manner dictated by the Great Powers. The bombardment of Corfu by Italy in 1923 was connived at by the League and no effective steps under the Convenant were taken to protect the victim. The Japanese aggression beginning with the occupation of Central Manchuria in 1931, and ending with the attack of Shanghai put the strength of the League to test. The League as usual could do nothing effectual but to pass in its Assembly a resolution condemning Japan.

The events surrounding the Fascist conquest of Ethiopia in 1936 reveal that the might of a State alone counts in the international order and that the sanctions of the Covenant were not intended to protect a small State against the aggression of a mighty State. The end of the League was also due to the apathy of the Great Powers which in their own political interests saw no use in adhering to the principle of collective security for which the League stood.

The Second World War has brought into existence the United Nations Organisation. Although the Charter of the United Nations is based on the principle of the 'Sovereign equality of all peace-loving States,' it reaffirms the primacy of the Great Powers in its grant of veto to the permanent members. The voting provision with regard to Security Council requiring unanimity of all the permanent members on matters other than those of procedure shows that the unity of action of the Great Powers is an indispensable condition for the substantive decisions of the United Nations. This provision disregards the principle of equality of States. The decisions at the Yalta Conference taken by the three Great Powers were imposed on the other member-Sates.

The hard facts of international political history do not prove that equality of States exists in action. It is said by some writers that the theory of equality means only equality before law and does not imply a political equality. It is not possible to dissociate law with politics in the international system. All political dealings of a State in relation to a State constitutes an international conduct governed by International Law. *Lawrence* observes :

> "The distinction holds good in a State where there is a legislative body to make the law and a judicial body to interpret it and not even unanimous consent to a political arrangement can make it legal unless the legislature enacts it and the judges enforce it. But in a system of rules depending, like International Law, for their validity on general consent, what is political is legal also, if it is generally accepted and acted on."

The primacy of Great powers has been continuing for a long time and can very well claim to have become a customary rule. There is thus a conflict between the rule of primacy of Great Powers and the principle of equality of States. The political actions which are generally motivated by lust of power and ambition and by national interests cannot have regard to any principle of equality.

Criticism of the doctrine of Fundamental Rights.— The natural law doctrine that States have certain rights which are inherent in their State-hood raised a good deal of controversy. The supporters of this doctrine were also divided on many points. They differred in enumerating these rights. There were writers who were in favour of ascribing to States rights of absolute character and asserted that these rights were possessed by States in the same way in which individuals possess fundamental rights. Some writers of this doctrine taking a more realistic view of the matter maintained that the rights were not at all of absolute character. They were of opinion that States possessed these rights under a custom which constituted International Law. The rights of the States were made dependent on the existence of customary International Law. *Westlake* strongly attacked the theory of inherent rights ; he drew a distinction between individuals and States and did not ageee that rights which may be conceded to natural persons belong to States which are at best associations of natural persons.

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1. Lawrence : The Principles of International Law p. 252.

The theory of fundamental rights of States was bitterly criticised by jurists of positivist school of thought on the ground that in view of the facts of international life States could have no inherent rights and they could only claim those rights which had been conceded to them by customary or conventional law. These jurists argued that the value of the rights lies in their recognition either express or implied by other States and thus these rights are not inherent in Statehood but are the product of eitheir custom or treaty. Writers opposed to the theory went to the length of saying that this theory had its origin in confusion of thought and was meaningless. They attacked the theory on more than one ground. It was said that the rights exist only in relation to the law which protects those rights, and if International Law is to protect the rights of the State, the rights arise under that law and cannot be said to be inherent or fundamental. It was further argued that there were no rights independently of the law; and therefore what are described as fundamental rights are mere liberties. A State in relation to other States cannot have absolute rights and cannot enjoy all the wanted liberties. *Alf Ross* speaking of the theory of fundamental rights observes:

> "The current doctrine of fundamental rights presents a sorry picture of methodical and systematic confusion marked by its derivation from national law. It consists mostly of speculative postulates which either were directly at variance with the evidence of experience or are formulated in such a way that they are really unmeaning even though solemn phrases cloak the emptiness of thought".[1]

According to him the so called fundamental right of independence and existence are limited by similar rights of other States; the States are extremely unequal in many respects and the rule of equality of States presupposes a law which excludes discrimination.

Kelsen, is of the view that in ultimate analysis it is not possible to deduce rights from nature and the principle of fundamental rights cannot possibly be maintained. He states that the rights of States are rights in so far as they are stipulated by general Internatienal Law. According to him it is not possible to deduce from the fact that the State is an international personality, rights such as are claimed by the exponents of the theory of fundamental rights, for if it

1. Alf Ross: A Text Book of International Law p. 191-192.

were supposed that rights arise from the fact that a State is an international personality it would have to be assumed that the State prior to its entering the international community was in possession of these rights and if it enters into the international community it submits to International Law and thereby restricts its rights. Lastly, he says:

> "When the so-called fundamental rights of the State are presented as derived from the nature of the international community or from nature or personality of the State they are, in truth, pre-supposed as established by a kind of natural International Law. Conferring these rights upon the national community prior to its entering the international community, at a time when the national community exists in a 'State of nature' analogous to that state of nature in which the individual—according to the natural law doctrine exists prior to his entering the national community, the State. In theory of national law this fiction was abondoned long ago; in t e theory of international law it is still consciously or unconsciously maintained, especially regarding the most important of fundamental rights, the right of equality and the right of sovereignty."[1]

To him rights of equality and sovereignty do not belong to a State prior to its entering the International Community; States are equal and sovereign because international 'law treats them to be so.

Brierly thinks that the theory does not offer a true philosophy and is untenable. According to him there are no rights inherent in the personality of a State, rights presuppose a legal system from which they get validity and the doctrine is unreal for he says that:

> "Doctrine implies that the social bond between man and man, or between State and State, is somehow less natural, or less a part of the whole personality than is the individuality of the man or the State and that is not true; the only individuals we know are individuals in society."[2]

He is of the opinion that this theory is really a denial of the possibility of development in international relations for

1. Kelsen : The Principles of International Law p. 154-55.
2. Brierly : The Law of Nations p. 51-52.

'when it asserts that such qualities as independence and equality are inherent in the very nature of States, it overlooks the fact that their attribution to States is merely a stage in an historical process."

Oppenheim, thinks that what are described as fundamental rights are real rights and duties that are customarily recognised as deriving from the very membership of the Family of Nations, that they do not arise from international treaties between States and they are granted and received reciprocally as members of Family of Nations. He agrees with those several writers who urge that "the notion of fundamental rights of States should totally disappear from the treatises on the Law of Nations."[1]

Developments in the theory of State Rights.—The scathing theoretical criticism of the doctrine of fundamental rights could not influence the attitude of the States which in their own interests, felt fortified by a legal theory in their claim for their inherent rights. The weak States for their own protection gave whole-hearted support to the doctrine. The powerful States also relied upon the theory of fundamental rights in support of their claim in respect of important and weighty matters. The attitude of the States in general was quite favourable to a doctrine which had the effect of strengthening their position as an International personality. The anxiety of the nations to preserve their rights as enumerated by the exponents of the doctrine of fundamental rights found expression in a few efforts to define once and for all the various rights and duties of the States without enquiring into the juridical basis of such rights and duties. The first effort in this direction was made in America where the American Institute of International Law in 1916 adopted at Washington a Declaration of the Rights and Duties of Nations. This Declaration defined the rights and duties of States. According to the Declaration every State has a right to exist, to protect and to conserve its existence without committing unlawful acts against any innocent State. Every State has right to independence without violating the rights of other States ; every State in law and before law enjoys equality with other States; every State has a right to exercise exclusive jurisdiction within its territory and every State has a right under the International Law to be respected and protected by all other States. Thereafter a report on 'Fundamental Rights and Duties of American Republics' was submitted to the International Commission of

1. Oppenheim : International Law Vol. I p. 235.

Jurists which met in Rio de Janeiro in 1927. The International Commission of Jurists submitted a draft treaty on 'States, their existence, equality and recognition' to the Habana Conference of 1928. But nothing came out of these efforts and no convention could be arrived at.

A Convention on Rights and Duties of States was adopted at the Montevideo Conference of 1933 which reaffirmed the doctrine of fundamental rights. This Convention in the main provided that States were equal, that fundamental rights of States were always to remain in tact and nothing could be done to deprive a State of their rights, that recognition was not necessary for the political existence of a State, that there could be no intervention in the internal or external affairs of a State and that international disputes were to be settled by amicable means. The Conference at Buenos Aires in 1938 and at Lima in 1958 reaffirmed a number of the principles of the Convention on Rights and Duties of States. At the Conference on Problems of War and Peace held in 1945 at Mexico it was resolved to prepare a draft of a 'Declaration of Rights and Duties of States'.

The matter of definition of the rights and duties of States was taken up by the International Law Commission which was established by the General Assembly of the United Nations in 1947. The Commission in its first session prepared a draft Declaration on Rights and Duties of States. This draft Declaration was referred by the General Assembly in 1949 to Member States for suggestions. Inasmuch as adequate suggestions have not so far been received a final decision has not so far been taken in the matter. The Declaration, if adopted by the General Assembly will end all theoretical controversies about the validity of the doctrine of fundamental rights.

Draft declaration on the rights and duties of States.—The International Law Commission prepared a draft declaration defining the various rights and duties which belong to States. It specifies four basic rights of States and enumerates ten duties. Its fourteen articles are :—

"*Art. 1.* Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of Government."

"*Art. 2.* Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by International Law."

"*Art. 3.* Every State has the duty to refrain from intervention in the internal or external affairs of any other State."

"*Art. 4.* Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife."

"*Art. 5.* Every State has the right to equality in law with every other State."

"*Art. 6.* Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language or religion."

"*Art. 7.* Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order."

"*Art. 8.* Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered."

"*Art. 9.* Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."

"*Art. 10.* Every State has the duty to refrain from giving assistance to any State which is acting in violation of Article 9, or against which he United Nations is taking preventive or enforcement action."

"*Art. 11.* Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of Article 9."

"*Art. 12.* Every State has the right of individual or collective self-defence against armed attack."

"*Art. 13.* Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

"*Art. 14.*—Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."

CHAPTER X

SUBJECTS OF INTERNATIONAL LAW

Subjects and Objects of International Law.—The terms, "Subjects of the law" and "Objects of the law" essentially belong to Municipal Law and they have been imported into International Law to convey the idea of rights and duties to be provided for by that law. "Subjects of the law are those to whom rules of law are immediately addressed, that is to say, they are directly obligated by the rules of law. Persons to whom law attributes rights and duties are the subjects of law."—"The Objects of the law are the things in respect to which rights are held and duties imposed."

Individuals as subjects of International Law.—The question is: "Whose conduct is regulated by International Law."

According to old juristic theory the obvious answer will be that States alone are the subjects of International Law, for it is States to which International Law is addressed and it is States to which that law attributes rights and duties. The exponents of this theory taking into account the formal relation of States and historical facts of international order argue that International Law is not concerned directly with the individuals and it only aims at regulating the conduct of the States. They illustrate their proposition by the statement tnat it is States which make peace or war, enter into treaties, meet at International conferences, discuss matters of common interest and figure as litigants before the International Court of Justice. These jurists altogether ignored the ultimate aim of all laws in general and of Inernational Law in particular and thus left out of account the position of the individuals in the scheme of International order. Their view is that individuals do not directly come into touch with International Law and hat individuals have no rights or duties save those

provided for by the Municipal Laws to which they are subject. According to them the individuals are not the subjects but merely objects of International Law.

The above theory is not now generally accepted. The modern juristic thought is in favour of the view that the individual is the real subject of International Law and the State is the mere agent through which the individual acts with reference to the rights and duties imposed by International Law. It is now maintained that the individual human being is the primary unit of the society, international or national and that State like a corporation is simply a juristic person. As the rights and duties of a corporation are but rights and duties of the members of the corporation, so the rights and duties of States are nothing but rights and duties of the individuals composing the State. The argument put forward by these jurists is that all law is essentially for the regulation of human conduct and like all law International Law is also for the regulation of human conduct and that the duties and rights laid down by International Law can have only human conduct for content. It is maintained that duties and rights of a juristic person like the State are nothing but collective rights and duties of the individuals in their capacity as members of the community represented by the State. "The subjects of International Law are—like the subjects of National Law—individual human beings. States as juristic persons are subjects of International Law in the same way as corporations, as juristic persons are subjects of National Law. The statement that States as juristic persons are subjects of International Law does not mean that individuals are not the subjects of the obligations, responsibilities and rights established by that law. It only means that individual human beings are indirectly, and collectively, in their capacity as organs or members of the State, subjects of the obligations, responsibilities and rights presented as obligations, responsibilities and rights of the State. Besides, human beings are also directly and individually subjects of obligations, responsibilities and rights established by International Law".[1]

The advocates of the theory that individuals are the real subjects of International Law support their argument by stating that there are numerous rules of International Law which are not concerned with States but with individuals, that individuals are sometimes allowed to appear before inter-

1. Hens Kelsen—Principles of International Law, p. 114—115.

national tribunals and that modern States are busy in a number of activities for the welfare of the individual human being. They point out that the democratic structure of modern society has for its basis the welfare of the individual and that International Labour Organisation is concerned with the individual as a human being. The famous Nuremberg trial provides a proof of the fact that individuals are also responsible for violation of International Law. The Charter of the United Nations may safely be taken to embody the modern juristic thought. Therein the peoples of the United Nations proclaimed their determination to re-affirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and to nations large and small. The various provisions in the Charter for the promotion of human rights and fundamental freedom established the importance of the individual in the international scheme. It would thus appear that the individual is not the object but the real subject of International Law and the State is simply an agent through which International Law is enforced. In the matter of procedural law the States but in the matter of substantive law the individuals are the real subjects.

States and their classification.—A State is a corporate juristic body which enjoys within its territory freedom from outside control and which acts as a free agent before the world. The law which governs its relations with other States is the International Law. It is International Law which attributes a legal personality to States. It is therefore State which is an International person. "As the law is the body of rules which the civilized States consider legally binding in their intercourse, every State which belongs to the civilized States, and is therefore a member of Family of Nations, is an International Person."[1] One of the essential conditions of Statehood is that a State must be independent in its affairs. All States do not enjoy full independence and within the Family of Nations are also included States which have their freedom controlled in some measure by other States. States are to be classified on the basis of the degree of independence which they enjoy. Classified in this manner States are either full sovereign and independent or not full sovereign and dependent, that is to say, perfect or imperfect international persons

Full Sovereign and Independent States.—It must be borne in mind that the restrictions imposed on States and its

1. Oppenheim—International Law (Seventh Edition) p. 113,

freedom by International Law have not the effect of reducing it to the position of a dependent State. The control exercised by one State over the affairs of another State results in the loss of independence. An independent State enjoys freedom both in its internal and external affairs. "Independence means freedom from control, and a State like United Kingdom or France is independent because it is free from all control either over its internal Government or over its foreign relations."[1] An independent State manages both its internal and external affairs without interference from any other State. It is a full Sovereign State and is a perfect international person.

Not full Sovereign and dependent States.—A State which has its freedom controlled by some other State is a dependent State. The idea of dependence implies a relation between a superior State and an inferior State; a relation between superiority and subordination. Dependent States are not full sovereign States inasmuch as they do not possess supreme authority and independence with regard to some functions of a State. We have seen that sovereignty is divisible and that with regard to some of its functions a State may yield to the control of another State. The outside control impairs the independence of a State but does not render it incapable of being a member of the Family of Nations or an international person. "It is not necessary for a State to be independent in order to be a State of International Law."[2] Dependent States are imperfect international persons.

Composite International Person.—Ordinarily, a State has a single political authority as Government and such a State is a simple international person. As distinguished from a simple international person, there are composite international persons recognised by International Law. When two or more sovereign States are so united that they appear as one single State before the world, a composite international person comes into existence. A composite international person may be either a Real Union or a Federal State which may be described thus :—

Real Union.—It is an union by a treaty of two Sovereign States under a common monarch. When two sovereign States by the terms of a treaty permanently unite under the same monarch there comes into existence a composite international person known as a Real Union. Such a Real Union becomes

1. Westlake—International Law. Vol. I (Second Edition) p. 20.
2. Westlake—International Law, Vol. I Page 21.

an international person when it receives the recognition of other States. The identity for purposes of International Law of the two sovereign States entering into a Real Union is altogether lost so that neither of those States can separately wage war or conclude peace. In the eye of International Law the two sovereign States so united appear as but one person. The treaties for each of the two States are entered in the name of the Union. The *Austro-Hungarian Monarchy* was a Real Union which was dissolved as a result of the First World War. At present there is no such Real Union in existence.

Federal State.—Another composite International person is a Federal State which comes into existence when a number of sovereign States in their common interest permanently unite under a central political authority known as a Federal State This union is either by a treaty of the Member States or by an agreed constitution. The competence or the legal power of the total State is distributed between rhe Central Government and the member States. The States uniting under a federation have their powers defined by the treaty or constitution and they are sovereign with regard to those powers while the Central Government which has its own organs is free to exercise the powers allocated to it. The Federal State within its competence can make laws binding on the Member States. The Member States are totally independent of each other. Federal State is an International person which can make war or peace, conclude treaties and send diplomatic envoys The Principal Federal States now in existence are :—

The United States of America, Switzerland, Mexico, Argentina, Canada, Germany, Venezuela, Australia, Soviet, Russia and India.

Indian Union.—The Indian Union is not a Federal State of the type of the United States of America but is of the pattern of the Canadian Federation. The Indian Constitution is neither purely federal nor unitary but is a mixture of the two. The provinces under the Government of India Act, 1935, were not sovereign and independent States but were mere agents of the Central Government having such powers as were delegated to them. The Indian Union is not the result of any agreement between the States. Unlike the Constitution of the United States of America the Indian Constitution does not preserve the original constitution of the various States but prescribes the constitutions of the

States as well as the Union. The Indian Constitution contemplates only one citizenship namely that of the Indian Republic. There is no dual system for administration of justice in India.

There is division of powers between the Union and the States and the Union has powers of control and supervision over the administration of States. The States are bound to carry out the direction of the Union which has the power to supersede the State Government in case of failure of a State to carry out its directions. No State has a right to secede from the Union.

The Indian Union is a sovereign State but maintains its membership of the Commonwealth of Nations. At the Prime Minister's Conference at London in 1949 India made a declaration that she will continue "her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of the independent nations and as such the Head of the Commonwealth." This declaration has no effect on the full sovereignty that India possesses and India is free to break off from the Commonwealth whenever it likes. The other Dominions within the Commonwealth recognised the status of India as that of a full sovereign State.

States not International Persons.—There are some unions of States which are not in the eye of law international persons. They are :—

(i) **Personal Union.**—It is a union of two sovereign States under one monarch. This union comes into being not as a result of a treaty but by sheer accident. It is not a permanent union but is merely transitory. Unlike a Real Union, the two sovereign States in a Personal Union are in the eye of law not one but two international persons A personal union between Great Britain and Hanover, from 1714 to 1837, between Netherlands nad Luxemburg from 1815 to 1890 and between Belgium and the former Cango Free State from 1885 to 1908 are well known to history.

(2) **Confederated States (Staatenbund.)**—A union of States under a confederation is not ordinarily an international person. *Oppenheim* describes confederated State as "a number of full sovereign States linked together for the maintenance of

their external and internal independence by a recognised international treaty into a union with organs of its own, which are vested with a certain power over the member States but not over the citizens of the States."[1] A confederation is a sort of association of Sovereign States for the purposes of their common interests. The member-States keep their sovereignty intact and are in the eye of law full international persons. The confederating States have a right to break of from the Confederation.

As a matter of fact the terms of a particular treaty prescribe the conditions on which the confederating States form the confederation If the terms are such as entitles the member—State to retain their independence, the member—States continue to be an international person. The German Confederation during 1815—1886 reserved the power of member—States to enter into such treaties as were not inconsistent with the treaty of confederation, to send diplomatic envoys to other States and to enter into alliances with States and the member—States thus enjoyed international personality. The Confederation of the United States of America during 1781—1789 also did not impair the international personality of its member-States.

It is doubtful whether in law any of these confederations as a unit possessed any international personality.

Imperfect International Persons.—Besides the States having full sovereign powers there are certain political bodies which, though they do not possess full sovereignty, are yet recognised by International Law as international persons. These political bodies or *communities* have a restricted international personality and may therefore be regarded as imperfect international persons. The following are such inperfect international persons :—

VASSAL STATES AND PROTECTORATES

Vassal States.—Those States which while independent in the management of the internal affairs are dependent upon the suzerain State for the management of their external affairs are known as Vassal States or States under Suzerainty. The rights of a Suzerain State over the Vassal State are international

1. Oppenheim—International Law Vol. I (Seventh Edition) p. 164.

rights. Suzerainty is not sovereignty but international guardianship. Unless deprived of all rights to have dealings with either full sovereign States under a treaty or an agreement, a Vassal State enjoys partial membership of the international community and has a limited international personality. Judge *Anzilotti* in his individual opinion in the case of the *Austrian-German Customs Union* (1931) explaining the concept of dependence of States stated that "the idea of dependence......necessarily implies a relation between a superior State (suzerain protector etc.) and an inferior or Subject State (Vassal, protege etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is such relation of superiority and subordination it is impossible to speak of dependence within the meaning of International Law."

Rumania and Serbia were Vassal States before 1878 when by the decision of Congress of Berlin they attained full sovereignty. Bulgaria between 1878 and 1908, though under a suzerainty, enjoyed full membership of the Community of Nations. The other important Vassal States were *Egypt* the *Transval* and the *Orange Free State*, *Tibet* and *Outer Mangolia*.

Tibet.—Tibet occupies a peculiar position. It had been for centuries a Vassal State under the suzerainty of China. The control which China exercised over Tibet was rather nominal In 1911 when China came into the grip of political revolution it lost all control over Tibet which asserted its full independence. To the foreign States its position was that of an autonomous State under the suzerainty of China. The effective control of China over the external affairs of Tibet was rendered possible by the Sino-Tibetan Treaty of 1951 which provided for the establishment of a Chinese Military and Administrative Commission in Tibet and under which China gained full control over Tibet's external affairs, communications and trade. Thereafter the political changes at Lhasa helped China in maintaining full control over Tibet; the position of Tibet became that of a State which is under the real suzerainty of China. In 1952 there was an agreement between India and China to the effect that the Indian Mission in China was henceforth to be designated as Consulate General. This agreement marked an end of direct relations of India with Tibet and resulted in recognising the supremacy of China over Tibet. India finally recognised China's sovereignty over Tibet in April, 1954

and agreed to withdraw its garrisons in exchange for trading rights.

The Tibetans were however not happy over China's domination and their resentment took the form of occasional disturbances which were subdued. The introduction of land reform by the Chinese Government in Khampa area which was mostly inhabited by the Tibetans and the migration of Tibetans from Khampa area to Tibet led to an open revolt against Chinese Government in March 1959. The Chinese Government in subduing the unrest announced the abolition of the regime of the Dalai Lama and the establishment of a new regime of the Panchen Lama for the 'Tibet Autonomous Regime'. The Dalai Lama along with some Tibetans fled from Tibet and after an ardous mountain journey sought asylum in India. India granted the asylum and the Dalai Lama along with his followers is comfortably living at present at Mussoorie. Future events will finally determine the position of Tibet in International Law.

Nepal.—Nepal has now attained full sovereignty and is an independent State. This independence she attained after the First World War. It was formerly under the suzerainty of the British Government in India which had effective control over her foreign affairs.

The King was the Head of this independent State. He was a mere figurehead as the entire Government was in the hands of the hereditary Prime Minister of the Rana family. The Prime Minister was a dictator whose rule of tyranny became intolerable for the people. After India attained independence in 1947 a political unrest to end the Rana regime and bring about a democratic form of government with the King at the head started. The King had sympathy with the nationalists' movement and himself wanted to end the absolute rule of the Rana Ministry. Some bloody insurrections in many parts of the country took place. India intervened and after a long course of events the principle of a democratic rule was agreed upon. Many temporary arrangements were made and ultimately on January 27, 1956 a council composed of 4 members of the Praja Parishad and 3 Royal advisers under Tanka Prasad Acharya came in office and the Rana rule was abolished.

Nepal has its own Constitution which came into force on June 30, 1959 and it has now a democratic form of Government with King at the head. The Constitution announced on February 11, 1959 provides for a bicameral Parliament

consisting of Pratinidhi Sabha (Lower House) and Maha Sabha (Upper House). It also provides for a Cabinet form of Government.

Nepal is a full Sovereign State under the International Law.

Indian States.—A large number of States which flourished during the British rule in India became merged in the Union of India, and have lost their identity altogether. They are now a part of the Republic of India which is a Sovereign State. Kashmir also acceded to India under an Instrument of Accession signed by the Maharaja and accepted by the Indian Government. It thus became an integral part of India. Pakistan disputes this position and claims Kashmir giving rise to what is generally termed -'Kashmir issue.'

Kashmir Issue.—The scheme of partition of the then British India and the Indian Independence Act of 1947 allowed Kashmir freedom of choice between India and Pakistan in the matter of accession. Soon after India gained independence, the Frontier Tribesmen with the military help of Pakistan raided Kashmir. The King of Jammu and Kashmir sought help of the Indian Union On the suggestion of India the King agreed to accede to the Indian Union and he signed the Instrument of Accession which India accepted. Kashmir thus became an integral part of the Union of India. The Indian Government sent its armed forces to repel the attack engineered by Pakistan. There was extensive fighting in a few areas of Kashmir and although India succeeded in repelling the attacks she on January 1, 1948 made a report to the Security Council about Pakistani aggressive invasion. India complained on the ground that Kashmir having acceded to it was its integral part and that Pakistan was guilty of agression in directing an attack against Kashmir. Pakistan raised the contention that the so-called accession was illegal and it was not guilty of any aggression Both the parties however agreed that their dispute was likely to lead to disturb international peace and security.

The Security Council on January 20, 1948 appointed a Commission for investigation and mediation. It adopted in April 1948, a resolution declaring that the dispute over Kashmir was a danger to world peace and expressing the view that it was necessary to stop the fighting and to bring about an atmosphere in which a free and impartial plebiscite may be held. The Commission was instructed to proceed atonce to the sub-

continent and place its good offices and mediation at the disposal of the two Governments. Ultimately the Commission submitted its report and proposed that the matter of accession was to be decided by a fair and impartial plebiscite and that a Plebiscite Administrator be appointed. The two Governments accepted the proposals with clarifications and understandings and ordered a cease-fire as from January 1, 1949. Later on an agreement on cease-fire line was arrived at between India and Pakistan.

The Council asked India and Pakistan to prepare a programme of demilitarization and appointed Sir Owen Dixon to assist in the preparation of the programme and to exercise the powers of the United Nations Commission and also to arrange for the assumption of functions by Nimitz, the Plebiscite Administrator. Sir Owen Dixon made his report that no agreement could be arrived at between the parties. He also asked to be relieved of his duties. The Council thereafter appointed Dr. Graham to get demilitarization effected. Dr. Graham made a report containing twelve proposals ; he analysed the main points of differences between the parties and asked the Council to bring about better relations be ween the parties Relations between India and Pakistan however did not improve and although Dr. Graham has so far submitted a number of reports and proposals, the Kashmir problem has yielded to no solution. Thereafter it was proposed to send a United Nations force to the disputed territory. This proposal failed because of the Russian Veto. Mr. Jarring the President of the Assembly was asked to go to India to make further investigation and report. Mr Jarring submitted his report mentioning that it was not possible to implement the earlier resolutions of the Council on account of changed circumstances and of certain military alliances such as the Baghdad Pact which Pakistan had entered. A number of discussions were held before the Council but with no result. Each party has been putting its case vehemently and this wordy warfare is constantly going on. The matter is at present undecided.

The position is that the State of Jammu and Kashmir is an integral part of India. The Accession has now been confirmed by the people of the State of Jammu and Kashmir acting through the Constituent Assembly elected by them. The Constitution of Jammu and Kashmir which came into force on January 26, 1957 in its Article 3 lays down that the State of Jammu and Kashmir is and shall be an integral part of the Union of India India retains full control over all matters connected with the defence, foreign affairs and communica-

tions of the State of Jammu and Kashmir. The Supreme Court of India is the highest judiciary for that State also.

Egypt--The United Arab Republic.—Till 1914, Egypt was under the suzerainty of Turkey. Turkey, however, lost her control in 1914 when Great Britain declared a protectorate over Egypt. In 1922 Great Britain while reserving its right to control defence of Egypt against all foreign interference protection of minorities and of Sudan and certain other matters of importance recognised independence of Egypt. Then came the famous Treaty of 1936 whereby Great Britain acknowledged independence of Egypt but retained its right of keeping troops stationed at the Suez Canal for the protection of the means of communication. This treaty marks a great landmark in Egyptian political history, for it provided for permanent alliance between Great Britain and Egypt. During the Second World War, Egypt joined hands with Great Britain in the destruction of Nazi Germany.

The Egyptian Parliament in October 1951 resolved to put an end to the obligations under the Treaty of Alliance of 1936 and declared Farouk as King of Egypt and Sudan. In July 1952 King Farouk abdicated as a result of *coup de' tat* and General Naguib became the head of the State of Egypt.

As regards Sudan an agreement in October 1952 was arrived at between Egypt and Sudan. This agreement provided for a self-government in Sudan.

Egypt and Syria agreed to form themselves into one State with one head, one legislation, one flag, and one constitution. This agreement was taken by 25 leaders of both the Countries and was announced in the Parliaments of both the countries. The new State known as the United Arab Republic came into existence on February 1, 1958 under a proclamation. The Parliaments of the two countries nominated Gamal Abdel Nasser, the President of Egypt for the Presidentship of the new State. An election was held in February 1958 and Nasser was elected the first President of the United Arab Republic. A provisional Constitution which is to last till a final Constitution is prepared which came into effect on March 5, 1958. The President has been vested with wide powers. He selects the Ministers and appoints Vice-president and Executive Councils for the two areas. He lays down the general policy of the Government and selects the members of the legislature known as the National Assembly under the provisional Constitution.

The United Arab Republic received recognition from many a States ; it notified to the Secretary—General that it would henceforth be represented in the United Nations as one single member.

A further development took place when the kingdom of Yemen under an agreement dated March 8, 1958 came to be federated with the United Arab Republic in a grouping called the United Arab States. The result of this federation is that each of these States, namely, the United Arab Republic and Yemen would each have their own system of Government. The Charter of the United Arab States provides for the system of Government. It also provides that the United Arab Republic and Yemen can consolidate their deplomatic representation abroad. No consolidation has so far taken place with regard to representative in the United Nations

Sudan.—Sudan became a condiminium under the Anglo-Egyptian agreement of 1899 which was confirmed by the Treaty of 1936 It was administered by a Governor-General appointed by the King of Egypt on the recommendation of the British Government. The Governor-General was assisted by an Executive Council of officials. In 1944, an Advisory Council of Sudanese was set up for Northern Sudan only to assist the Governor-General. Sudan attained self-government under an Anglo-Egyptian Agreement of February 11, 1953. A regular legislature was established and the Governor-General got the assistance of the Prime Minister and a Cabinet of 10 to 15 Sudanese members. Some matters of defence and foreign affairs were reserved to the Governor-General.

Political events took such a turn that the Constituent Assembly on August 31, 1955 declared Sudan a Republic. The foreign yoke was thrown off and Sudan became a Sovereign Republic having a Constitution of its own. On November 17,1958 the Sudanese army under the command of General Ibrahim Abboud overthrew the constitutional government, dissolved the 'Parliament and suspended the Constitution. At present Sudan is under a Military rule.

Protectorates.—A protectorate is a relationship between a weak and a strong State and is established by a treaty. When a weak State places itself under the protection of a stronger State for the management of its foreign affairs while retaining its independence with regard to its domestic affairs, a protectorate is established. The distinction between

a Vassal State and a State under a protectorate lies in the fact that the protected State always retains some of its International personality. The heads of protected States enjoy the immunities. The protected State not being a part of the superior protecting State is not necessarily a party in a war waged by the protecting State against a third State. In the case of a protectorate a weak State voluntarily surrenders a part of its sovereignty while in the case of a vassalage, the suzerain State gives some autonomy by way of concession.

The two European protectorates are the Republic of Andora and the Republic of San Marino.

Protectorates are of two kinds, namely, Colonial protectorates and International protectorates. A colonial protectorate has no international personality and is, according to Professor *Max Huber* in the *Palmas* case (1928), "rather a form of international organization of a colonial territory on the basis of autonomy for the natives."

The expression 'international protectorate' was explained by the Permanent Court of International Justice in the case of the *Nationality Decrees* issued in Tunis and Morocco (1923) in which it was observed that "inspite of common features possessed by protectorates under International Law, they have individual legal cheracteristics resulting from the special conditions under which they were created and the stage of their developments." The relationship beween the protecting State and the protected State is to be deduced from the terms of the treaty or the agreement under which the protectorate has been established and also from the circumstances under which the protectorate has been recognised by other States. Professer *Max Huber* in the case of the *Beni—Madan, Rzini claim* (1925) stated the law in regard to protectorates thus: "Protectorates are institutions which must be examined in accordance with the circumstances of each individual case, even though they can be grouped into certain distinct categories. As regards Morocco it appears that this State is represented in international relations by the protecting Powers (France and Spain), and this is equally true of the regime concerning foreigners.

......If the protectorate suppresses direct diplomatic relations between the protected State and third States, so that these are unable to direct themselves directly to the former, it is essential that, corresponding with this limitation imposed on third States, there should be a duty borne by the protecting State to reply to them in place of the protected State.

......The relations between the protecting and the protected State constitute an internal matter between these two States, where foreigners are concerned, the responsibilities of the protecting and the protected State although judicially distinct, can only lie—against the protecting power."

The French Protectorates.—France exercised protection over Tunis, Morocoo, Annam, Toking and Combodia which form the French Protectorate. By the Treaty of Versailles Morocco was divided into three parts. One part came under the French Protectorate, the second part was given under the protection of Spain while the third part constituted the neutralized zone of Tangier.

The so-called French Protectorate is not now in existence. The question of ending the French protectorate over Tunis and Morocco came before the General Assembly of the United Nations in October 1952 in spite of the opposition offered by France on the ground that Tunisians and Moroccans were unfit for self-government. France has declared that the matter whether French Protectorate should or should not cease with regard to Morocco and Tunis is a domestic affair and the United Nations are not competent to adjudicate on it. In August 1953 the French Government deposed the Sultan of Morocco and banished him from the protectorate.

The situation in Morocco became serious and on August 21, 1953 thirteen Asian and African States together with Liberia and Thailand made a request for an urgent meeting of the Security Council for the purpose of taking an appropriate action under the Charter with regard to the situation arising from the deposition of the Sultan The General Assembly included the question of Morocco in its agenda. The French Government did not partake in the discussion that followed on the ground that it was a domestic question and the United Nations was not competent to intervene. The thirteen Asian and African States proposed that the General Assembly should recommend the establishment of a democratic representative Government in Morocco in order that Morocco might attain full sovereignity and independence. These States based their case against France on the ground that French Government had violated the Act of Algeciras and the Treaty of Fez and, the human rights and the rules of International Law. A number of States opposed this proposal on the ground that the United Nations was not competent to go into the question that according to the Treaty of Fez the conduct of Morocco's external affairs

was the sole responsibility of France, and that international security was not at stake. The Asian-African draft resolution was not adopted. The General Assembly again at its ninth session at the request of fourteen Asian and African States considered the question of Morocco. At the debate in the General Assembly, France took the stand that it had the intention of calling upon the Moroccan people to manage their own affairs within the frame-work of Moroccan Sovereignity and that it would carry out its responsibilities in comformity with its traditions and in loyality to the spirit of the Charter. Morocco again figured before the General Assembly at its fourth session. The stiff attitude taken by France did not allow the General Assembly to decide anything.

While this was happening in the General Assembly the Moroccans were rising in revolt and civil strife in Morocco took a grim turn. The nationalist movement compelled the French Government to recall the deposed Sultan and restore him to the throne. The Sultan was invited by the French Government in February 1956 for negotiations in respect of the Moroccan demand for independence. These negotiations resulted in a declaration by the French Government of the independence of Morocco in March 1956. Morocco thus became an independent full Sovereign State.

The national movement in Tunisia attracted the attention of other nations and eleven Asian and African members of the United Nations asked the Security Council on April 2, 1952 to consider the Tunisian position. The debate for the inclusion of the Tunisian question in the agenda brought no result and the Security Council could not discuss the matter. The same Asian and African countries took the matter to the General Assembly which at its seventh session discussed the question of Tunisia. The French Government declared that its relationship with Tunisia was a domestic matter and declined to participate in the discussion. The Tunisia question was again discussed by the General Assembly at its ninth session, but in view of the fact that negotiations between the Tunisian national leaders and the French Government were going on the consideration of the question was postponed. These negotiations resulted in the conclusion of the Home Rule Convention between France ana Tunisia on April 22, 1955. Thereafter began efforts for the establishment of an independent State of Tunisia. The French Protectorate has terminated and Tunisia is a Sovereign independent State.

Annam, Toking and Combodia struggled for emancipation

from the foreign yoke. The spirit of nationalism which pervaded the whole of Asia after the second world war led these countries to engage in civil wars against the French Government. After years of civil strife these countries got their long cherished freedom. The Geneva Conference of 1954 which resulted in agreement on certain basic principles put an end to the grim and long Civil War and paved the way to emancipation from foreign rule. The French abandoned North and South Vietnam and also Combodia. The northern part of Annam and the State of Toking form what is now known as the Democratic Republic of Vietnam North). The southern part of Annam forms part of the territories of the Republic of Vietnam (South). The kingdom of Combodia also enjoys freedom as a Sovereign independent State and is a member of the United Nations. The French Protectorate has thus disappeared.

The British Protectorate.—Basutoland, Bechuanaland Swaziland in South Africa,and the Malaya Federation consisting of the nine Malaya States and Penang and Malacca constituted the British Protectorate South Africa has been for a long time asking Great Britain to transfer Basutoland, Bechuanaland and Swaziland to it The British Government has not yet acceded to this request. Malaya after some struggle attained freedom and on August 31, 1957 the Federation of Malaya became a Self Governing Dominion of the British Commonwealth.

Sikkim.—By the Treaty of 1890 between Great Britain and China the protectorate of the British Government over Sikkim was fully recognised. This position continued during the British rule in India. When India attained her independence, the British Protection was removed. In 1950 a treaty between India and Sikkim was concluded and Sikkim became a protectorate of India. The Indian Government is responsible for the defence, external affairs and communication with regard to Sikkim. In all other matters Sikkim enjoys its autonomy.

MANDATED AND TRUST TERRITORIES

Mandated Territories.—Article 22 of the Covenant of the League of Nations provided for international guardian-

ship of certain Turkish and German colonies and territories which as a consequence of the First World War ceased to be under the sovereignty of the States which hitherto governed them and which were not in a position to stand by themselves under strenuous conditions of the modern world. This method of international guardianship is known as the Mandate System under which the territories and colonies after having been detached from Germany and Turkey were entrusted to certain other States called 'Mandatory States' for the purposes of administration on behalf of the League of Nations. The Mandatory States were enjoined to administer these territories on conditions specified in the written agreements called 'mandates' concluded between the League and the Mandatory States.

Mandated Areas.—The Mandated territories were divided into three classes A, B and C.

A. Class A mandated territories were those which formerly belonged to the Turkish Empire and which had reached a stage of development where their existence as independent nations could be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they were able to stand alone. Great Britain was constituted a Mandatory State with respect to Iraq and Palestine. In 1932 the Council of the League terminated the mandate with respect to Iraq subject to certain guarantees to be given by Iraq. Later on, Iraq was admitted to the membership of the League. Syria and Lebanon were mandated to France. During the Second World War, France agreed to recognise the independence of Syria and Lebanon subject to certain conditions. In 1944 Great Britain and the United States of America recognised the independence of these States and both these States became the original members of the United Nations.

B. Class B mandated territories were those in respect of which the mandatory State was to be responsible for the administration under conditions which will guarantee freedom of conscience and religion, the prohibition of abuses such as slave trade, the arms and liquor traffic and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory and which will secure equal opportunities for the trade and commerce of other Members of the League. Great Britain accepted the mandate with regard to British Cameroons, British Togoland,

Tanganyika. France was constituted mandatory with respect to French Cameroons, and French Togoland. Belgium was made mandatory to Ruandu Urundi. The position of Class B mandated territories as international person was doubtful.

C. Class C mandated territories were territories such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population or their small size, or their remoteness from the centres of civilization, or their geographical continuity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.'

South-West Africa was given to Mandatory Union of South Africa ; Samoa to New Zealand, Naurn to Great Britain Australia and New Zealand jointly, other Pacific Islands South of Equator to Australia and Pacific Islands North of Equator to Japan. These mandated territories did not possess any international personality.

These mandated territories having ceased to be the ownership of Germany and Turkey belonged to no State. The Mandatory States could not under the mandates exercise rights of ownership over the mandated territories. They had to exercise only those powers which were granted to them in the mandates. The control exercised by the Mandatory States was under the supervision of the Council of the League, advised and assisted by the Permanent Mandates Commission.

Trusteeship System.—The mandate system of the League has been replaced by the Trusteeship System by virtue of the provisions of the Charter of the United Nations. The United Nations in Article 75 of the Charter undertakes to establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. The trusteeship system has been declared to apply to :—

(*a*) territories hitherto held under mandate ;

(*b*) territories detached from enemy States as a result of the Second World War ; and

(*c*) territories voluntarily placed under the system by States responsible for their administration.

The trusteeship system does not apply to territories which have become Members of the United Nations.

Objective.—The object of the trusteeship is :—

"(*a*) to further international peace and security ;

(*b*) to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement ;

(*c*) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the inter-dependence of the peoples of the world ; and

(*d*) to ensure equal treatment in social, economic, and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80."

Trusteeship Agreements.—The Charter provides for the conclusion of trusteeship agreements in respect of States to be placed under the Trusteeship system. Article 81 of the Charter directs that the trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. The trusteeship agreement with regard to non-strategic areas is to be approved by the General Assembly but that in respect of strategic areas are subject to the approval of the Security Council It is also provided in the Charter that the Security Council shall, subject to the provisions of the trusteeship agreement and without prejudice to security considerations avail iteslf of the assistance of the Trusteeship Council for the purpose of performing the functions of the United Nations under the Trusteeship system relating to political, economic, social and educational matters in the strategic area.

Duty af administering authority.—The Charter imposes an obligation on the administering authorities to ensure that the trust territories shall play their part in the maintenance of international peace and security. The trusteeship agreements that have been so far made, though varying from each other in some terms, prescribe duties of the administering authorities consistent with the objects of the Trusteeship System. The general duty of the administering authority is to administer the trust territory in such a manner as to achieve the basic objective of the trusteeship system as laid down in Article 76 of the Charter. The administering authority is required to administer the trust territories under the supervision and control of the United Nations. It has to submit reports to the General Assembly on important matters arising from its administration The administering authority is responsible for the peace, order, good government and defence of the trust territory. It is free to take any measures that are necessary for the defence of the territory entrusted to it. It is the duty of the administering authority to take steps to ensure progressive development towards self-government or independence of the trust territory and with this end in view allow inhabitants of trust territory participation in the Governmental affairs. It is required to grant the inhabitants of trust territories freedom of speech, of the press, of assembly and petition as well as freedom of conscience and religion subject to requirements of public order and tranquillity.

Functions of the United Nations.—It is the United Nations which are responsible for the working of the Trusteeship System. The Charter makes a distinction between strategic and non-strategic areas to be brought under the Trusteeship System. The Security Council is to perform the functions of the United Nations including approval, alteration or amendment of the trusteeship agreements with regard to the areas which are designated as strategic. It is the General Assembly which is to exercise the functions of the United Nations including approval, alteration and amendment of the trusteeship agreement with respect to areas which are not designated as strategic. The Trusteeship Council is to render assistance both to the General Assembly and the Security Council in the performance of their functions under the Trusteeship System.

Trusteeship Council and its Functions.—It is an organ of the United Nations established with a view to ensure the smooth working of the International Trusteeship System. The

Trusteeship Council under the authority of the General Assembly may :—

(*a*) consider reports submitted by the administering authority ;

(*b*) accept petitions and examine them in consultation with the administering authority ;

(*c*) provide for periodic visits to the trust territories at times agreed upon with the administering authority ;

(*d*) take these and other actions in conformity with the terms of the Trusteeship agreements.

Composition.—The Trusteeship Council is composed of :—

(*a*) those Members as are administering trust territories ;

(*b*) such of those Permanent Members of the Security Council as are not administering trust territories ;

(*c*) states elected by General Assembly for three years in such a number as may be necessary to ensure that the total number of members of Trusteeship Council is equally divided between these Members of the United Nations which administer trust territories and those which do not.

Each member of the Trusteeship Council is to designate one specially qualified person to represent it thereon. It will appear that one-half of the members of the Trusteeship Council are Members who do not administer trust territories and this is a sufficient guarantee for the impartiality and independence of the Council.

Neutralized States.—"A neutralized State is a State whose independence and integrity are for all future time guaranteed by an International Convention of the Powers, under the condition that such State binds itself never to take up arms against any other State except for defence against attack, and never to enter into such international obligations as could indirectly involve it in war."[1] The neutralization of a State is the result of an international agreement whereby the Great Powers agree to accept the status of the neutral State and the neutral State undertakes to refrain from war except in self-defence and from entering into agreements which

1. Oppenheim– International Law Vol. I P. 219.

may involve it indirectly into a war. A State connot attain the position of a neutralized State by simply declaring itself to be neutral without entering into an international agreement with Great Powers. It is an international treaty concluded between the Great Powers and the neutral State that confers the status of a permanently neutralized State.

The consequences that flow from neutralization of a State are that the neutralized State cannot take part in any war directly or indirectly except for self-defence and cannot enter into any agreement which may involve breach of the terms of neutralization. The neutralized State gets a fixed status and such a State can neither acquire any new territory nor cede any part of its territory without the consent of the Great Powers.

A State does not lose its international personality by neutralization A neutralised State remains a full Sovereign Power and cannot under the law be regarded to have lost its independence.

Switzerland.—Switzerland has for a long time followed the policy of neutrality. It became permanently neutralized in 1815 when at the Congress of Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden and Russia signed a declaration whereby the neutrality of Switzerland was recognized. This neutralization of Switzerland was again recognized by the Powers at Paris in November 1815 after the defeat of Napoleon. Since then Switzerland has maintained its neutrality. The League of Nations also recognised its status as a neutral State by admitting it as an original member on an understanding that she "shall not be forced to participate in a military action or to permit the passage of foreign troops or the preparation of military enterprises upon her territory." Switzerland has not become a member of the United Nations and has thus retained its neutrality.

Belgium.—Belgium was neutralised in 1831 as a result of the Treaty of London of 1831 which was signed by Great Britain, Austria, France, Prussia, Russia and Belgium. In 1839 when Belgium finally separated from Netherlands under the treaty of London of 1839 which was signed by Great Britain, Russia, Prussia, Austria, France and Holland the neutralization of Belgium was re-affirmed. Germany in 1914 violated the neutrality of Belgium and at the end of First World War Belgium made request to the Powers to allow her to cease to be neutralized. This request was accepted and Belgium

ceased to be neutralised after the First World War. Belgium is now a member of the United Nations and bears the burden of collective responsibility for international peace and security.

The Holy See and the States of Vatican City.—The Roman Catholic Church a community of individuals which though not a State is an international person. The Pope called the Holy See represents this Church and is recognised to have the right of sending envoys and of concluding treaties with other States. The church is an order constituting a community which comprises the Catholics of the whole world. The difference between the Church and the other States as international person lies in the fact that no war can be waged against the Church and the Church cannot itself wage war against the other States.

The State of Vatican City covering an area of about 100 acres and having the population of about 700 came into existence as a result of the Lateran Treaty of 11th February, 1929, between Italy and the Holy See. The Pope is the Head of this State. There is a personal union between the Church and the State of Vatican City. The State of Vatican City has a territory while the Church has no territory but both are International Persons.

Belligerent Communities.—International Law recognises the status of political communities which are struggling to attain statehood and which have not finally settled as a new State. In a civil war insurgents who have effective control over a part of the territory and the population of a State within which civil war takes place are recognised as belligerent power and therefore subjects of International Law. This recognition proceeds on the principle that the rebellious community is yet a part of the State from which it is endeavouring to separate and set itself up as an independent State. Such a belligerent power which is for the time being independent has a claim to the protection of International Law.

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CHAPTER XI

THE COMMONWEALTH OF NATIONS

Description.—The expression 'British Commonwealth of Nations' represents an institution and has its origin in the report adopted at the Imperial Conference of 1926. The British Commonwealth of Nations was accepted as being "group of self-governing communities composed of Great Britain and the Dominions" which was a part of the then British Empire. This British Commonwealth of Nations was thus a group within the British Empire itself. It may be noted that the use of this expression was necessary for the purpose of emphasizing the equality of certain parts of the British Empire with Great Britain and of distinguishing them from the rest of the portions of that Empire. The Imperial Conference of 1926 recognised the autonomy of some of the parts of the British Empire which were to constitute the British Commonwealth of Nations. The report adopted at the Conference described the members composing the Commonwealth thus :

> "They are autonomous communities within the British Empire, equal in Status, in no way subordinate to one another in any aspect of their domestic or external affairs though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."

This report was made by the Inter-Imperial Relations Committee presided over by Earl Balfour which had been set up by the Conference. A number of recommendations suggesting changes in the Inter-Imperial relations and relations with foreign nations were made by the Committee and were accepted by Imperial Conference.

The British Commonwealth of Nations was renamed as "the Commonwealth of Nations" in 1948 when the Dominion Office received the new name of the 'Commonwealth Relations Office.'

The present members of the Commonwealth of Nations are the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, South Africa, India, Pakistan, Ceylon, Ghana and Malaya.

History of the Commonwealth.—The events after the First World War led to the formation of the British Commonwealth of Nations. Before that war the Dominion of South

Africa, Canada, Australia and New Zealand did not enjoy international personality and were merely parts of the British Empire. Australia and Canada in some matters enjoyed freedom but they were not independent or sovereign States. The freedom that they enjoyed had been granted by the mother country, the United Kingdom. These dominions enjoyed a higher status than colonies within the British Empire. The Imperial Parliament was Supreme and had the right to legislate for the dominions.

The dominions participated in the First World War on equal terms with the Great Britain and rendered all possible help in the war effort. India as well as these dominions were represented in the British delegation to the Peace Conference after the war. They were signatories to the Peace Treaty and were admitted to membership of the League of Nations. Australia, New Zealand and South Africa received mandates directly from the League. In this way the Dominions were recognised as possessing a sort of international personality. In 1926 the Imperial Conference discussed the status of these dominions and the Inter Imperial Relations and accepted the report of its Inter-Imperial Relations Committee which not only declared the autonomous character of these communities but also recommended that they should be allowed to enter into treaties with foreign States, to be represented at international conferences and to manage their foreign affairs The adoption of this report brought expectations to the dominions that they would acquire full international personality. There was held in 1930 another Imperial Conference which reaffirmed the principles accepted at the earlier Conference. An important recommendation accepted by this Conference was that the British Government when negotiating with a Foreign Power should inform the Dominions and ask them to express their views on matters affecting their interests.

The implementation of the recommendations approved at the Imperial Conferences of 1926 and 1930 was secured when the British Parliament enacted the Statute of Westminister, 1931 whereby the dominions acquired full autonomous statehood and ceased to be in any way dependent States. It was provided in the Statute that no dominion law would be void for repugnancy to the law enacted by the British Parliament, that the dominions will have a right to repeal any law enacted by British Parliament in so far as it affected them and that the British Parliament, would cease to have power, unless requested by the dominion, to pass any law to be operative in the dominions. The Statute of Westminister had far reaching conse-

quences, for it had the effect of altering the status of the dominions altogether. The dominions acquired a status equal to that of their mother country. The Imperial Conference of 1937 recognised the fact that each member of the Commonwealth exercised the right to take part in multilateral treaties as an individual entity and a member was not bound by a treaty entered into by another member.

The sovereign status of the dominion came into prominence when Great Britain declared war in 1939. Eire asserted the right to remain neutral and no question was raised as to the legality of her action. Canada though sought approval of the King, of declaration of war, made the actual declaration of war in the form of proclamation signed by the Prime Minister and sealed with the Great Seal of Canada This proclamation was made on September 10, 1939 several days after the declaration of war of the United Kingdom. Canada made another declaration of war against Japan, a day earlier than the United Kingdom. South Africa declared war on Germany by a proclamation signed by the Governor-General on September 6, 939. The declaration of war made by Australia on September 3, 1939 was in these terms :

> "Britain has declared war and as a result Australia is at war also."

The existence of a State of War was gazetted the same day New Zealand acted in a manner similar to that adopted by Canada, as it also declared that it was at war as the United Kingdom. It will not be possible to say that the declaration made by Canada and New Zealand were inconsistent with their position of sovereign States, for the mere fact that declarations of war were made shows that the States were acting as independent and sovereign States. The flaw in the procedure cannot be regarded as affecting the rights of Canada and New Zealand as independent States. Great Britain with Northern Ireland, India, Canada, Australia, New Zealand and Union of South Africa signed the United Nations Declaration of January 1, 1942 at Washington. They became the origina l members of the United Nations.

The period after the second world war saw many developments. There has been according to Sir Ivan Jennings the emergence of 'Commonwealth in Asia on account of India,

Burma, Pakistan and Ceylon becoming independent and sovereign States. India and Pakistan became independent in 1947. Burma became a sovereign Republic in 1948. Ceylon attained dominion status in February 1948. Malaya became a Federation and Jersey got a new constitution. The words ' Emperor of India" were omitted from the Royal Title. New Foundland under an agreement dated December 12, 1948 became a province of the Dominion of Canada. Indian Republic in 1949 became a member of the Commonwealth and accepted the "King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth." Southern Ireland on becoming a Republic ceased to be a member of the Commonwealth. In 1950 the Commonwealth Conference formulated what is known as the Colombo Plan for the development of South East Asia. Another Conference was held in 1952 to solve the problem arising out of dollar deficit. In 1953 the Federation of Rhodesia and Nyasaland came into existence. This Federation is not an international personality and the United Kingdom remains responsible for its international relations. In August 1954 Royal assent was given to the the British Caribbean Federation Act. The former colony of the Gold Coast and the trusteeship territory of Togoland were formed in 1957 into a new State of Ghana with a dominion status.

It will thus appear that since the formation of the Commonwealth a number of countries which were part of the British Empire have attained full statehood Although the members of the Commonwealth have no common language, common culture or common religion, they are bound together by a common purpose—the achievement of peace, liberty and progress.

Aims and objects of the Commonwealth.—A corporate body comes into being with certain aims and objects which precede the incorporation. An association of individuals is formed with certain aims and objects. The Commowealth of Nations does not follow the scheme of a corporate body or an association, for it came into existence without ostensible aims and objects. The idea of a commonwealth originated in the pangs of inevitable separation and a desire to maintain some link howsoever feeble with the original four dominions which were quickly progressing towards a full statehood and the advancement of which could not be arrested for any length of time. The British Empire had exercised a domination over the four dominions

for a long time and the time had arrived when it was not possible to prevent the dominions from attaining independence and from severing all connections from it. The Commonwealth of Nations was formed to keep up some relations with the Dominions which were ready to part company. No aims and objects were formulated before the establishment of the Commonwealth. They were found out to serve as good grounds for perpetuating the Commonwealth which can at least foster unity among its members.

It is not at all necessary to enquire into the motives which led to the formation of the Commonwealth. What is important to know is the purpose that the Commonwealth will serve. An association or a society of nations, the members of which are knit together in their common interests is not only desirable but necessary. Both political and economic reasons exist for the desirability of an association of States. Common interests in many a field will be advanced if a few States with one mind proceed to act Material progress in a State is at present not possible if foreign co operation and help is not forthcoming. It is thus in the interests of the members of the Commonwealth to unite among themselves and thereby make progress politically, economically and socially. The idea of Commonwealth born out of nothing has great potentialities and it is for the members to take advantage of it and make the Commonwealth a success. The aims and objects the members should have in view in trying to maintain and preserve the Commonwealth of nations may be briefly stated thus :—

1. To bring about co-operation among the members for promotion of common economic interests. A State in modern times depends on trade and commerce to augment its revenues. In these matters of commerce in which there is no competition among the members there is desirability of co-operation among them. This co-operation is possible under stabilising force of the Commonwealth.

2. To lay down a common policy and to act in union in meeting political and economic situations that may arise in international and national spheres to endanger international peace and security. The members of the Commonwealth when confronted with some threat to one or all of them or to the world at large will serve not only their interests but will do useful service to other States if they on joint deliberation

lay down a policy of action and follow it in union to meet the danger. The adoption of such a course of conduct is not possible outside the Commonwealth.

3. To strive for the advancement of human rights in the cause of world peace and for promotion of social and cultural association of all nations. The commonwealth is capable of doing a lot in the advancement of human rights and in the maintenance of world peace. According to the Charter of the United Nations the States should aim at achieving "international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." This aim can be achieved by the members of the Commonwealth in their free association with each other and in a co-operative spirit among them.

4. To encourage respect for International Law and the United Nations and its various organs. The members of Commonwealth in unity are capable of helping in the maintenance of the rule of law in international sphere. Their united action will tend to be an example for the rest of the world and is likely to be followed by them.

5. To strive for their own political, economical and social advance through mutual consultation and co-operation. The members of the Commonwealth by mutual help and co-operation can bring about their own material advancement. The deficiency in any field of activity of one State can be made good by help and co-operation offered by the other Industrial progress as well as advancement in civilization can be easily secured by mutual help and co-operation.

These are the broad aims and objects which are to be kept in view in preserving the Commonwealth and for the achievement of which the members should spare no effort. It is for the members to make the Commonwealth a real success. The Commonwealth is a smaller family within the big Family of Nations. If it brings about a real unity among its members it is likely to attract to its fold the rest of the world and the dream of a World Federation would be realized.

Constitution of the Commonwealth.—The Commonwealth of Nations is not a legal entity and has no cons-

titution and no governmental organization. It is a loose association of free and independent States and the manner in which it functions is circumscribed by certain unwritten parliamentary rules and conventions. A spirit of good will and friendship pervades the mutual relations of members and the relations between the Commonwealth and its members. The Commonwealth as an entity separate from its members exercises no power or authority over the members The 'Queen of England' is at present the 'symbol of the free association' of independent States collectively called the Commonwealth of Nations and is at the Head of the Commonwealth.

It is important to note the position of the Crown of the United Kingdom as regards the Commonwealth and its members. The Crown in his capacity as the Head of the Commonwealth is the 'symbol of the free association' of independent States. He is the sovereign of all the members of the Commonwealth except India, Pakistan and the Federation of Malaya. The administration in all the countries except India, Pakistan and Malaya is carried on at present in the name of the Crown who is merely a Constitutional Sovereign. The Governor-Generals of the countries administered in the name of the Queen are appointed by the Crown and they function as the "representative of the Crown holding in all essential respects the same position in relation to the administration of public affairs in a Dominion as is held by His Majesty the King in Great Britain." The Governor-Generals so appointed act independently of the Crown with the advice of the Government of the country administered by them. All the countries in the Commonwealth except India, Pakistan and Malaya owe allegiance to the Crown although all of them are independent States and possess international personality. The Queen of England at present has a double role ; she is the Head of the Commonwealth and also the Queen commanding allegiance of all the members of the Commonwealth except India, Pakistan and Malaya. The Commonwealth is nothing but a loose association of a number of independent States managed on a few cardinal principles deduced from historical facts and is perpetuated to serve varied common interests of its members.

Legal Status of the Commonwealth.—The Commonwealth which is loose association of free Nations does not fit in any legal classification of States. It is not an international personality in its own right. It is a class by itself and may be described as an association of States or a community of

States. It is not at all a legal entity. *Oppenheim* considering the legal status of the Commonwealth observed thus :

> "It is apparently *sui juris* and defies classification. It is not a Federal State because there is no organ which has power both over the member-States and their citizens. It is not a Confederation because there is no treaty which unites the member-States and no organ which in fact and, for all material purposes, in law has power over them. It is not a Real Union because there is no treaty which unites member-States and because each of the Dominions can enter into separate treaties, and full powers to sign them are issued upon the advice of the Dominion Cabinet. Probably it is not a Personal Union because it is the essence of that relationship that two or more distinct Crowns should be accidentally (and often temporarily) united in the same holder and may even (as in the case of Great Britain and Hanover) be governed by different laws of descent, whereas the Crown in the British Empire is one and undivided It is a community of States in which the absence of a rigid legal basis of the association is powerfully compensated by the bonds of common origin, history, legal tradition and solidarity of interests."[1]

The Commonwealth thus possesses no legal Status and has been rightly described as "a sprawling collection of nations with no common obligations, with no co-ordinated line of action in world affairs and at odds with each other (which) makes up an International System which is a travesty of the word 'Commonwealth'. It is a product of slow evolution and is not the result of any agreement of nations."

Status of the members under the International Law.—The Members of the Commonwealth are independent sovereign States which are international persons. They possess full statehood and have rights and obligations under the International Law. The Membership of the Commonwealth places in the eye of law no restrictions upon their sovereignty or independence. They are not at all subordinate to the United Kingdom but enjoy equal status with it. They have a right to manage their own affairs, to formulate their own policies, to enact their laws, to negotiate and enter into international agreements, send their diplomatic envoys to foreign

1. Oppenheim : International Law Vol. I p. 191

countries, regluate their foreign affairs and to make war or peace with other States. The fact that on the outbreak of the second world war the members of the Commonwealth made their own declarations of war and did not rest content with the declaration made by United Kingdom fully justifies the conclusion that they are independent as United Kingdom. The fact that Burma was allowed to terminate its membership of the Commonwealth offer a precedent on the right to secede. Lord *Listowel* when moving the Second Reading of the Burma Independence Bill in the House of Lords stated the position of the members thus :

> "We here do not regard membership of the Commonwealth as something to be thrust by force upon a reluctant people, but as a priceless privilege granted only to those who deeply desire it and are conscious of its obligations as well as its advantages. The essence of the Commonwealth relationship is that it is a free association of nations with a common purpose who belong together because they have decided of their own volition to give and take their fair share in a world-wide partnership."

The Member-States of the Commonwealth are now masters of their own destiny : they are free to adopt any form of Government and to make any laws for their territories. The Governments of the member States are generally responsible to their Parliaments and perform their functions in the manner they like without being controlled by any higher authority. The four old dominions are no doubt nominally linked with the Crown of the United Kingdom by reason of the fact that the administration of these countries is carried on in the name of the Crown and the Crown appoints the Governor-General for these dominions. This link is a matter of form not of substance and does not affect the sovereignty of these dominions. The fact that they owe allegiance to the Crown does not indicate an element of subordination of the dominions for one may owe allegiance and yet be independent and sovereign in its own right. To the other member-States the Crown is merely a 'symbol of free association' and nothing more In this way all the member-States enjoy both internal and external independence.

The member-States are responsible for their own defence and are free to manage their own defence organization. They may hold consultations on problems of defence with other members or with the United Kingdom but this fact does not

fetter their own discretion in the matter. Their defence policy is entirely their own. The Commonwealth does not maintain any defence organization.

The member-States have freedom of making their own laws. They are free to frame their own citizenship laws ; they have a right to define their nationals and citizens A member-State has itself to determine the status that it is to allow to the citizen of another member-State The United Kingdom, Canada, Australia, New Zealand and Malaya Federation have formed their own Citizenship Laws. They have granted citizenship rights to the nationals of other member-States. The Union of South Africa has its own citizenship laws but it does not provide for citizenship to the nationals of other member-States. Although the freedom of treating the nationals of the other member-States exists, the practice is that a member State would not treat the national of another member-State an alien The case of Eire which has now ceased to be a member of the Commonwealth is worthy of notice. Most of the members of the Commonwealth do not even now regard a national of Eire as an alien. Eire exchanges Ambassadors with other Commonwealth Nations. The foreign relations of Eire with the United Kingdom are continued not through the Foreign Office but through the Commonwealth Relations Office.

Diversity in the Commonwealth.—Great disparity is evident among the members of the Commonwealth and one who looks at this organisation cannot fail to notice it. The present ten member-States of the Commonwealth vary widely in history, size, geography, race, religion, culture, population, economic development and form of Government Besides these, the member-States have different political ideologies. The A ian and African countries are different in culture, religion rasce from the other member-States of the Commonwealth All of them have different historical facts of their political, economic and cultural development. The Asian and African countries long remained backward ; their manifold development and full-fledged statehood has a history of its own which is entirely different from that of the American or other members. The territories of the member-States vary in size ; Ceylon is the smallest in size while Canada has the biggest area of land as its territory. There is India which has the biggest population and then there is NewZealand which is the smallest in population. Diversity also plays its part in the internal administration of the various members.

Australia.—The Commonwealth of Australia is a federation of six independent States with the Crown at its head. The Governor-General of Australia is appointed by the Crown on the recommendation of the Australian Government, carries on the administration as a representative of the Crown and he is the executive head of the Commonwealth of Australia. In fact the Cabinet of Ministers, headed by the Prime Minister, discharges the executive function and is responsible to the Parliament The Parliament is composed of a Senate and a House of Representatives. Every State enjoys a responsible form of Government. There exists a division of power between the Commonwealth and the various States.

Canada.—Canada is also a federation of ten provinces. The British North America Act (1867) as amended by subsequent Acts provides the Constitution of Canada. It owes allegiance to the Crown in whose name the administration is carried on. The Governor-General is appointed by the Crown and acts on the advice of the Privy Council which constitutes the Cabinet. The legislative power lies with the Governor-General, a Senate of Members nominated for life and a House of Commons elected on population basis. The Canadian Constitution is a mixture of federation and cabinet system.

New Zealand.—New Zealand is another Dominion which owes allegiance to the Crown in whose name the administration is carried on. The executive authority vests in the Governor General assisted by the Executive Council but is exercised by the Cabinet of Ministers headed by the Prime Minister. The Parliament consists of only one House of Representatives having 80 Members elected for 3 years on the basis of population. The Governor- General is appointed by the Crown on the recommendation of the Government of New Zealand.

Union of South Africa.—The Union of South Africa is a Dominion owing allegiance to the Crown and is being governed in the name of the Crown. The executive power of the Union vests in the Governor-General assisted by the Executive Council. The legislative power vests in a bicameral Parliament consisting of a Senate and House of Assembly. The Senate consists of elected as well as nominated members. The House of Assembly is a purely elected body. Each Province is governed by Administrator assisted by a Provincial Council which elects an Executive Committee. The supreme legislative authority is the Union Parliament.

The United Kingdom of Great Britain and Northern Ireland is a hereditary constitutional monarchy with an unwritten constitution. The executive authority is exercised by the Crown through a Cabinet of Ministers headed by the Prime Minister. The Cabinet is responsible to the Parliament. The legislative power is exercised by a bi-cameral Parliament consisting of a House of Lords and the House of Commons.

Ceylon.—Ceylon is now a full fledged Dominion owing allegiance to the Crown in whose name the administration of the country is carried on. The executive authority is exercised by the Governor-General with the advice of the Council of Ministers headed by the Prime Minister. There is a bi-cameral Parliament consisting of a Senate and a House of Representatives.

Ghana—Ghana reprsents a new State formed with the territories of the former Gold Coast colony and Togoland, which was under the Trusteeship system. It came into existence as an independent State on March 6, 1957 with a Dominion Status The State is governed in the name of the Crown. The Governor-General is advised by a Council of Ministers headed by the Prime Minister. The Parliament is unicameral consisting of only the National Assembly, members of which are elected for five years. The Governor-General is to be an Englishman appointed by the Crown.

Malaya.—The Federation of Malaya attained independence on August 31, 1957. It is a constitutional monarchy. The Monarch is elected every five years from amongst the rulers of Malayan States by the rulers. It does not owe allegiance to the Crown but its defence and foreign policy is under the control of the Crown There is Legislative Council members of which are partly elected. It is at present the supreme legislative body. The executive power is exercised by the Monarch through the Cabinet headed by the Prime Minister.

India.—India it a Sovereign Republic and has a federal type of Constitution which came into force on January 26, 1950. It has a parliamentary system of Government. The executive at the Centre vests in the President and a Council of Ministers headed by the Prime Minister. All executive actions are taken in the name of the President who is also the Supreme Commander of the defence forces. He is removable from office by impeachment for any violation of the Constitution. He must be a citizen of India. The Council of Ministers works on the principle of collective responsibility. The Prime Minister is appointed by the President. The Council is responsible to the

Lok Sabha. The Ministers however hold office during the pleasure of the President.

The legislative power belongs to the President and the Parliament consisting of the Rajya Sabha (Council of States) and the Lok Sabha (House of the People). The Union Parliament is exclusively competent to legislate on matters specified in the Union list. It is also competent to legislate on matters specified in the concurrent list on the resolution in that behalf passed by the Council of States. Every State legislature is competent to legislate on matter specified in the State list.

The Supreme Court of India is the highest judiciary in India and is the guardian of the Constitution. It has also an advisory jurisdiction.

The States enjoy responsible Government.

Pakistan.—Pakistan has been under military rule since October 7, 1958 and the Military Commander acting as the President is exercising all the governmental functions. It is also a Republic and a full Sovereign State.

The one peculiarity in the forms of Government of the various member-States is, that there is everywhere a responsible form of Government marking a triumph for democratic principles.

The member-States have formulated their own foreign policies and they react to international events differently. Australia, New Zealand and Pakistan have become active members of the South East Asia Treaty Organization (SEATO) set up by the United Kingdom and the United States of America in defence of the Chinese communism. Canada is the original member of North Atlantic Treaty Organization (NATO). Pakistan has also linked itself to the CENTO and to the United States of America for military aid. The United Kingdom takes a leading part in all these three organizations. (SEATO, NATO and the CENTO. These alliances emphasize the distinctive political creeds of these member-States. It will be noticed that excepting India which is not linked with these various Organizations all the member-States have associated themselves to one or more military or regional pacts and also to powerful nations both within and outside the Commonwealth of nations. India alone is pursuing her policy of non-alignment. Canada has "an old, enduring and reciprocated friendship" with the United State of America for it has common defence problems, and good relations with

the United States in trade, finances and industry. Australia and the United States have joined the Anzus Pact.

India and the Commonwealth.—India as a sovereign Republic is a member of the Commonwealth. The status of India as a Republic raised a question of principle before the Commonwealth In 1949 the matter was discussed at a Conference of the Prime Ministers of the Commonwealth and it was decided that India would remain a member of the Commonwealth as a Sovereign Republic, that she would not owe allegiance to the Crown, that the Crown will merely be a 'symbol of free association' of independent nations, that the members of the Commonwealth would "remain united as free and equal members of the Commonwealth of nations, freely co-operating in the pursuit of peace and liberty and progress." that India would continue to enjoy Imperial preferences and that Indian citizens will enjoy the same right within the Commonwealth as they did before the independence. It would seem that India did not part with any portion of her sovereignty or independence in linking itself to the Commonwealth. The association of India with the Commonwealth will be productive of good results in the case of world peace.

Commonwealth in action.—There is a method in the work of the Commonwealth which functions thoroughly. It is to be noted that the Commonwealth as an institution is distinct from the United Kingdom or the Government of the United Kingdom. The United Kingdom is as good a member of the Commonwealth as the new State of Ghana. The mere fact that the Crown which is for the members of the Commonwealth a 'symbol of free association' is of the United Kingdom cannot be a ground for identifying the Commonwealth with the United Kingdom. The United Kingdom, no doubt, enjoys a special position not because that it is or represents the Commonwealth but because it has an outstanding position in the Family of Nations, because it was at one time the master country of the member-States and because its Crown is the Head of the Commonwealth.

The Commonwealth has no secretariat and no general staff. It has simply an office known as the United Kingdom Office of Inter-Commonwealth Relations at London This office receives and communicates information to the Department of External Affairs of the member-States. The Department of External Affairs of a member-State sends communication to the Commonwealth Relations Office. The office at London is

daily in communication with all the member-States and is daily in receipt of information from the member-States. This is an uninterrupted method of work. There is "incessant inter-change of intelligence of common interest which is conducted through the U. K. office of Inter-Commonwealth Relations". There are officers in the staff of the member-States who discharge some duties concerning the Commonwealth relations. The most important work of the Commonwealth Relations Office is to keep the member-States informed of everything of any interest to them. The Commonwealth Relations Office also keeps in touch with the Foreign office of the United Kingdom so that it may act consistently with the foreign policy of the Government.

The members of the Commonwealth exchange High commissions in connection with Commonwealth relations. The High Commissions are accredited by one Government of the member-State to that of the other member-State. They enjoy the usual immunities and rank with the Ambassadors. They perform the Ambassadorial functions. These High Commissions accredited to the United Kingdom Government by the member-States meet fortnightly and discuss issues involving matters of policy. This exchange of views help in solving many an important problem. Sir Oliver Franks in his Reith Lectures gives a description of the manner in which work of the Commonwealth is done. He says "We all know that the Commonwealth is an unity. But in Washington I said how that unity worked Every fortnight except in the summer the eight Ambassadors of the Commonwealth meet in our Embassy to exchange and consult informally together. We discussed everything : the movement of affairs in the world, the latest phase of American policy and the opinions of our different countries about them. We did not mince words. Even difficulties between individual members, like Kashmir, were regularly talked over by all of us including India and Pakistan, without conviction without heat. Further the discussions took place between like-minded people who shared a common political tradition No one had to insist on the freedom of his country because no body ever questioned it. We had a common approach. We accepted common standards. We had forbearance which is essential between members of a continuing club when they differ."

A spirit of good will and cooperation pervades the entire method of work of the Commonwealth. The diplomats and statesmen of each of the member States are constantly meeting

each other and are in discussion of every matter of any interest to them. The discussions held in this way always remove misunderstandings and facilitate agreements. As a matter of fact the decisions taken at such meetings are not at all binding on the members. A member is free to pursue his own course of conduct and may have no regard for what was decided at the meetings and conferences. But the exchange of views and the discussion have an enormous influence on the future action of States. The meetings are generally informal and the inner motives, and prejudices of the Governments are often revealed.

Formal gatherings of the Prime Ministers of the member States are also held and important international events and matters of policy are fully discussed. There are also formal meetings of the Finance and Foreign and other Ministers of the member-States for discussion of problems having economic and financial implications. The rule of unanimity in decisions prevail but the unanimous decisions are binding only at the choice of the member-States. The Prime Ministers' Conferences were held in 1946, 1948, 1949, 1951. 1953, 1955, 1956 and 1957. There was in 1952 the Commonwealth Economic Conference at which the Prime Ministers of most of the member-States participated. The Finance Ministers Conference was held in 1952 and 1954. The Commonwealth Trade and Economic Conference met at Montreal in 1958 to discuss mattres of trade and commerce and was attended by the Finance Ministers of the member States of the Commonwealth. The Foreign Minister's Conference of 1950 brought out the famous Colombo Plan for cooperative economic development in South and South East Asia. A meeting of Defence Ministers and another of the Supply Ministers were held in 1951. Besides these, frequent informal meetings of the Ministers are held for consultation on various matters of common interest.

Prime Minister and Ministers of one member-State often go and visit their counterparts of the other member-States and in this way also exchange of views and consultation takes place. It would appear that discussion and consultation among members on all kinds of matters involving their interests is the regular and the most important feature of work of the Commonwealth. These conferences and these formal and informal meetings have taken the place of the Imperial Conferences that were held before the Second World War. The last Imperial Conference was held in 1937.

There are some technical organisations in many a field of activities of the Commonwealth. They are the Commonwealth Economic Committee, the Executive Committee, the Executive Council of the Commonwealth Agricultural Bureaus, and the Commonwealth Shipping Committee. These committees serve a useful purpose in their own spheres for they aim at specialized study of the situations and the problems arising therefrom.

Present position of the Commonwealth.—An association of States like that of the Commonwealth of Nations which having withstood the whirlwind of tumultuous international events occurring after the Second World War has undoubtedly a bright future. Despite the great diversity of size, race, religion, population, culture, language, political ideologies among the member-States, a spirit of cooperation and good-will pervades the inter-Commonwealth relations. The promotion of common interests call for cooperation and the member-States fully realize that their membership of the Commonwealth without in any way restricting their undoubted independence results in benefit to them. The membership of the Commonwealth ensures that cooperation which is needed for solving economic problems. The member-States have established commercial relations among themselves for their economic well-being. They are also aware that they belong to the Sterling bloc and can have the advantage of the currency in their trade dealings. They, as exporters have a favourable market in the Commonwealth nations and as importers they are assured of their supplies with preferential treatment. The Colombo Plan furnishes an example of co-operative effort that the member-States are capable of in the interest of economic development. Such a plan is bound to result in making undeveloped nations industrially and economically strong. The mutual dependence of the Commonwealth Nations is a hard fact which despite the difference in the political views keeps them united. The force and strength of the Commonwealth is derived not from the volition of its members but from the peculiar situation of their inter-dependence and their mutual benefit.

The present position of the Commonwealth is that while its members disagree among themselves with regard to their political policies, they are united in their determination to promote their common interests to keep on progressing and to bring about international peace and security. The Commonwealth of Nations has solid foundations in the community of interests and is managed through cooperation and good-will.

There is a common purpose which counsels the maintenance of such an institution, the membership of which enables participation in the discussion of the world affairs, involving political and economic issues and active action in commercial and social matters. The member-States are further " willing to combine their efforts and consult more or less regularly to meet the threat from countries feared by all" and thus to advance the cause of world peace.

The Commonwealth represents an association of free nations willing to co-operate in the advancement of principles of peace, liberty and progress. In the words of *Lord Listowell* the Commonwealth "exemplifies a new kind of greatness, a new kind of strength, a strength not based on physical force, on weapons or on the industrial power and the natural resources required to produce them, but on social solidarity, the toughness of which can withstand disintegrating forces at moments of the highest tension." It is the cooperative spirit of the members that imparts strength to the Commonwealth. Moreover, it aims at bridging the economic gap between East and West through cooperation of its members.

The future of the Commonwealth is however assured. It is not possible for the member-States to Secede from the Commonwealth for their own interests will compel them to remain within the Commonwealth. The future will bring in within the Commonwealth more States who are progressing to become independent. Nigeria, Central Africa Federation, West Indian Islands, and the Federation of Rhodesia and Nyasaland are likely to attain full statehood at no distant time. The membership of these States will add to the strength of the Commonwealth.

CHAPTER XII

STATE TERRITORY

State territory.—The existence of some territory for a State is most essential for there can be no State without a territory. The territory of a State is that part of the globe over which a State exercises its sovereignty or supremacy. It is in relation to territory that we speak of territorial supremacy of the State. All things and persons on a territory of a State are

within the territorial supremacy of the State. The territory may be described as a sphere of the jurisdiction of a State. A State is supreme within its territory. "The territory of the State is a space within which acts of the State and specially its coercive acts, are allowed by general International Law to be carried out, a space within which the acts of a State may legally be performed."[1]

The territory of a State may either be integrate or dismembered. Territory is integrate when it consists of one piece of land. It is dismembered when it consists of several parts of land which are separated from each other by territories belonging to other States. These several separated parts form but one unit in relation to the State to which they owe allegiance

Condominium.—Normally the territory is subject to the supremacy of one State. But law recognises that it is possible for a territory to be under the supremacy of two or more States. The true case of supremacy of two or more States over a territory is provided by a *Condominium*. Two or more States holding sway over a territory form a *Condominium* The territory under a *Condominium* is subject to the supremacy of more than one State. Sudan in 1898 came under the *Condominium* of Great Britain and Egypt. New Hebrides have since 1914 been in the *Condominium* of Great Britain and France.

Nature of State territory.—The territory is a public property of a State. It is not the property of the monarch of the State or the Government or the people. The territory belongs to the State which has the right to exercise its supremacy over it. A State may give up its right of supremacy in favour of another State. The State owning a territory is competent to hand over the administration of a part of its territory to some foreign State on certain conditions. In such a case the supremacy is exercised by a foreign State with the consent of the owner State. The island of Cyprus was under British supremacy with the consent of owner-State, Turkey during 1878 and 1944. The owner-State may lease a part of its territory to a foreign State and the lessee State may be authorised to exercise its supremacy over the leased territory.

State territory in land and waters—The territory of a State consists in land and water and always has well defined boundaries. The waters of a territory of a State are either national ot territorial. The national waters consist

1. Hans Kelson—Principles of International Law Page 209

of waters in its lakes, in its canals, in its rivers together with their mouths in its ports and harbours and in its gulfs and bays. The territorial waters consist of waters contained in a certain zone or belt called the maritime belt which surrounds a State. The national waters belong exclusively to the State and no foreign State can claim a right of passage over them while territorial waters can be used for passage by foreign ships. The territorial waters begin from a spot at which the national waters end.

The sub-soil to an unbounded depth beneath and the space to any height above, land and water belongs to the State which owns the territory of land and water on the surface. No foreign State has a right to make use of the territorial atmosphere for its telegraph wire and for its aerial navigation.

International Law recognises that men-of-war and other public vessels on high seas as well as in foreign territorial waters are floating parts of the territory of the State owning the vessels. Similarly, houses in which foreign diplomatic envoys have their official residence are treated as parts of the States of the envoys .

Rivers.—Rivers constitute a valuable part of the territory of a State. Those rivers which from its source to its mouth lie within the territory of a State are exclusively owned by the State within the territory of which they lie and they may be called *national rivers.* The rivers which run through the territory of more than one State belong to all those States through the territories of which they run. The State owns that part of the river which lies exclusively within its territory. These rivers owned by more than one State may be called *not national rivers* Besides these national and not national rivers there are rivers which form boundary line between two States and these rivers are called boundary rivers. These boundary rivers belong to the States which they separate and the boundary line of each of these States thus separated lies through the middle of the rivers or through the mid-channel of the river.

International rivers are those rivers which separate several States or run through several States during their course which are navigable from the open sea. The importance of these international rivers lies in the fact that merchantmen of all nations have right of passage through them in time of peace. The question of freedom of navigation over these rivers

was for the first time agitated on the occasion of the Treaty of Paris in 1814 and although many Conventions with regard to this matter followed thereafter there has been no unanimity among the States as to whether there is absolute freedom of navigation over a particular river. The League of Nations made a serious attempt to formulate the river law but before any conclusion could be reached the Second World War came in. It is hoped that the United Nations International Law Commission would tackle the problem of freedom of nevigation in a proper manner.

It must however be borne in mind that International Law does not permit any State to change the flow of the not-national, boundary and international rivers to the disadvantage of the neighbouring States. Similarly, no State can use the water of a river in such a manner as may be a source of danger to the neighbouring States.

Lakes and Land-locked seas.—Lakes and land-locked seas lying entirely within the territory of a State belong to that State and are a part of its territory Those lakes and land-locked seas which are surrounded by territories of several States belong to all those States which own the surrounding territories. Besides these there are international lakes and land-locked seas like international rivers. These international lakes and land-locked seas that are surrounded by the territories of several States yet navigable from the open sea are actually used by the merchantmen of all nations.

It would be interesting to note that *Black Sea* formerly was a land-locked sea lying exclusively within the Turkish territory. The approach to Black Sea was through Bosphorus and the Dardanelles which exclusively formed part of the Turkish territory and which were not open to merchantmen of all nations. Now the Black Sea is part of the open sea and is not the property of any State.

Canals.—Canals having artificial courses for navigation belong to the State to which they owe their existence. For the purpose of International Law inter-oceanic canals need only be mentioned, for States interested in navigation may ligitimately claim benefit of inter-oceanic canals. Canals which are constructed within the territory of a State have no international importance for they cannot be of any use to other States.

The Suez Canal.—The most important inter-oceanic canal is the Suez which connects Red Sea with the Mediterranean. By the Convention of Constantinople of 1888 the Suez Canal was declared open to the merchantmen and men of war of all nations both in time of peace as well as of war. The Convention of Constantinople laid down that in time of war even if Turkey was belligerent no act of hostility would be allowed either inside the canal itself or within three sea miles from its ports There were other restrictions for men of war during war. In 1914 Great Britain proclaimed a protectorate over Egypt. By Treaty of Lausonne of 1923 Turkey renounced all her rights over Egypt. In 1922 Egypt achieved qualified independence from British protectorate. The question of the defence of the Suez was reserved for future consideration. The Treaty of Alliance of 1936 between Great Britain and Egypt while recognising that the Suez Canal was an integral part of Egypt and essential means of communication between different parts of British Empire provided that it would be defended by British forces stationed in Egyptian territory. In 1950 Egypt under King Farouk demanded withdrawal of British Forces from the Suez The British Government repelled this demand on the ground that the Treaty of Alliance was binding and could not be cancelled except with mutual consent Egypt established a blockade to achieve its object. In September 1951, the matter was taken to the Security Council of the United Nations. The Security Council affirmed the principle of freedom of transit through the Suez Canal under the Convention of 1888 and Egypt was asked to withdraw the blockade. The Egyptian Parliament in October 1951 abrogated the Anglo-Egyptian Treaty of 1936 and refused to participate in the Middle East Command. Great Britain supported by the United States of America reaffirmed its treaty rights and reinforced its garrison at the Suez. This attitude of the British Government led to the formation of an anti-British party in Egypt. This party committed serious riots in Cairo and the political situation in Egypt took a serious turn. In July 1952, General Neguib led an army coup and declared himself to be military dictator.

General Neguib made a declaration that the Suez Canal belonged to the Egyptian people and that Britain had no right to keep its forces in the Canal Zone. Britain was adamant in its attitude and paid no attention to the Egyptian demand. In April, 1953 negotiations for an agreement about

the proper maintenance and control of the Canal bases stated between the two countries but they proved abortive with the result that tension increased and both Egypt and Great Britain repeated their respective demands. Early in 1954 Egypt suffered an internal crisis resulting in the resignation of General Neguib and the unanimous election of Nasser as the President of the Egyptian Republican Government, Nasser while pursuing the policy of his predecessor indicated his willingness to come to terms with Britain. On July 10, 1954 the British Government gave certain proposals for the settlement of the dispute. These proposals were not acceptable to Egypt and the negotiations went on resulting in the signing of the Anglo-Egyptian Agreement on October 19, 1954. This Agreement provided for the evacuation of the British forces from the Canal Zone within 20 months and for the maintenance of military bases in Canal Zone by Egyptian Government and British civilian contractors. In July 1956 Nasser made a declaration nationalizing the Canal. Both Great Britain and France denounced this declaration as wholly arbitrary and a serious threat to the freedom of navigation on a waterway of vital international importance.' A conference of 22 nations held at London agreed to a plan for international operation of the Canal. Egypt was informed of this plan but it refused to assent to any form of internationalization of the Canal. Britain on the initiative of the United States of America proposed to establish a "Suez Canal Users Association" to employ its own pilots, collect tolls and manage the waterway. Egypt cried over and appealed to the Security Council to take cognizence of Anglo-French threats. The Suez Canal Users Association was formally inaugurated on October 1, 1956. The Security Council laid down principles for further negotiation. Israil aided by Britain and France invaded Egyptian territory at the end of October 1956. The General Assembly early in November 1956 passed a resolution calling on Israil, France and Britain to evacuate all Egyptian territory. Thereafter began the slow work of removing the whole tension and restoring the *status quo*. The United Nations Emergency Force was sent to maintain order. The Canal was again opened to traffic after some clearance operations carried on by the Emergency Force. On March 20, 1957 President Nasser asserted that all tolls must be paid to Egyptian Canal authorities. He declared that there would be no discrimination against Anglo-French shipping and that the Convention of 1888 would be respected. The Suez Canal is thus open to vessels of all nations.

The Kiel Canal.—Next in importance comes the Kiel Canal connecting the Baltic Sea with the North Sea. This canal lies within the territory of Germany which constructed it Though open to vessels of all nations Germany held the control of navigation on the Kiel Canal before the first World War. The Treaty of Peace with Germany provided that "the Kiel Canal and its approaches shall be made free to the vessels of commerce and of war of all nations at peace with Germany on terms of equality." This provision of the Treaty of Peace was interpreted by the Permanent Court in the case of the *Wimbledon* The British Ship, *Wimbledon*, chartered to a French Company was carrying munitions for the Polish Government from Salonika to Danzig. In asmuch as the Polish Government was at War with Russia, Germany refused passage through the Kiel Canal. The Permanent Court held that the Kiel Canal was open to the vessels of the States which though at peace with Germany were involved in a war in which Germany was neutral. The Treaty of Peace was denounced by Germany in 1936 without evoking any protest from the majority of signatories of that Treaty. The result was that in 1937 the German Naval Command made it obligatory for the vessels of other States to obtain permission before entering the Kiel Canal.

The Panama Canal.—The Clayton-Bulwer Treaty of 1850 which was concluded between Great Britain and the United States of America provided that the Canal when built will be protected by the contracting parties and will be open and free for all. This treaty was, however, superseded by the Hay-Pouncefote Treaty of 1901 between Great Britain and the United States of America which provided for the construction and management of the Panama Canal by the United States and which gave an international status to the Canal. It was agreed that the Panama Canal was to be free and open to the vessels of commerce and of war of all nations, it was never to be blockaded and no act of hostility was to be committed within the Canal area. The United States was granted the right to maintain such police force along the Canal as was necessary.

In 1903, the Hay-Varilla Treaty between the United States and the Republic of Panama led to the construction of the Panama Canal. The Republic of Panama granted to the United States land for the construction of a canal from Colon to Panama with right to protect and manage the canal after it had been built. This Treaty further provided that the canal when built shall enjoy perpetual neutrality and shall be open

to vessels of all nations. The Panama Canal was opened in 1914 and the United States is responsible for its protection and management. It is open to the vessels of commerce and of war of all nations under the rules framed in that behalf.

Maritime Belt.—The importance of maritime belts to States having a sea-coast cannot be over-stated. States having a sea-coast are under International Law entitled to exercise supremacy over a certain portion of the sea which touches their land territory. The part of the sea over which a State having a sea-coast or a littoral State exercises territorial supremacy and which is regarded as a part of the territory of the littoral State is known as the maritime belt. According to the view of the majority of writers this maritime belt is measured from a straight line drawn along low water-mark of the sea. Starting from this low water-mark the breadth of the maritime belt is generally recognised to be three miles. This maritime belt of three miles in width measuring from the low water-mark of the sea represents the part of the territory of the littoral State. The chief characteristics of this maritime belt are :—

(*a*) the littoral State is the supreme authority within the belt with regard to matters of police and control. The littoral State is competent to make regulations and to make rules for passage of .vessels of foreign States ;

(*b*) the littoral State may prevent foreign vessels from navigation and trade along the coast known as *cabotage* and may reserve this *cabotage* exclusively for its own vessels. The littoral State may enter into treaties with regard to this *cabotage* ;

(*c*) the littoral State may reserve the fisheries within the belt for its own subjects ;

(*d*) the littoral State is competent to make laws and regulations regarding maritime ceremonials to be observed by such foreign merchant-men as may enter its territorial maritime belt ;

(*e*) the littoral State is bound to keep the maritime belt open to merchant-men of all nations for inoffensive navigation. The littoral State cannot levy toll for such passage from foreign vessels. Only those foreign vessels which may cast anchor within the belt or enter its port may be made liable for dues and tolls by the littoral State;

(f) the littoral State cannot refuse passage to foreign men-of-war through its maritime belt in times of peace.

It will therefore appear that the maritime belt is the property of the littoral State and the surface and sub-soil of the sea bed under the maritime belt is the property of the littoral State. It may however be noted that the littoral State cannot claim a maritime belt round the light houses on the open sea. The waters in the maritime belt are territorial while those in the ports, harbours, road-steads and the mouths of the rivers are national. Ships entering a port, harbour, road-stead or mouth of a river casting anchor within the maritime belt come within the jurisdiction of the littoral State in case peace and order outside the ship are disturbed.

Cabotage.—The term 'Cabotage' is now used for the trade carried on along a coast belonging to the one and the same State between two of its ports. The littoral State has a right not to permit foreign vessels to carry on such trade within its maritime belt but to reserve cabotage for its own vessels.

Protective Jurisdiction outside the maritime belt.—Littoral States have for a long time claimed jurisdiction over some part of the open sea outside their maritime belt chiefly for the purpose of enforcement of their custom and security laws. The jurisdiction thus claimed is known as "Protective jurisdiction". Strictly speaking International Law does not allow a littoral State to exercise jurisdiction over the open sea outside the maritime belt but the long standing practice of littoral States is in favour of the rule that a littoral State can impose duties under its Customs and Security Laws on foreign vessels which are bound for their ports and which are approaching but which are not yet within the maritime belt. According to *Oppenheim* the above rule is one of customary International Law inasmuch as other estates have acquiesced in it.

The United States claimed this extended jurisdiction for the purpose of preventing offences against its liquor laws and a number of treaties between the United States and foreign States were concluded in order to enable it to search and seize vessels attempting to violate its excise laws outside the maritime belt. The Anglo-American Liquor Treaty of 1924 providing for the Protective Jurisdiction established the principle of one hour zone, by which a British vessel

attempting to violate the American liquor laws could be seized outside the maritime belt within a zone represented by a distance which could be traversed in one hour by a vessel. The Anti-Smuggling Act of 1935 rendered it possible for the United States to exercise jurisdiction over part of the open sea outside the maritime belt.

Ports, Harbours and Roadsteads.—The ports, harbours and roadsteads within the maritime belt constitute the territory of the littoral State but the jurisdiction that the littoral State exercises with regard to vessels entering the ports and harbours is different from that it exercises in respect of its maritime belt. The littoral State undoubtedly exercises jurisdiction over the vessels entering its ports in case peace and order outside the ship is disturbed or persons outside the ship are affected. As regards its jurisdiction over vessels if its internal peace is disturbed there is a controversy. Some writers maintain that the littoral State cannot exercise any jurisdiction in case the internal peace and order of the ship is disturbed. *Oppenheim* is of the view that "there is no rule of International Law which limits its jurisdiction to this extent, and it can therefore claim jurisdiction in all matters over such merchantmen as have cast anchor within the maritime belt or entered a port together with the persons on board."[1] A Convention and Statute respecting the International Règime of Maritime Ports was arrived at on December, 1923 and it has been ratified by a number of States. This Convention is based on the principle of reciprocity and applies to all vessels, both public or private and to all kinds of ports. It allows access of vessels to all maritime ports and provides for a treatment of all vessels on the footing of equality.

Islands.—Islands within the maritime belt belong to the littoral State but those that lie beyond it donot necessarily belong to the nearest littoral State. The Permanent Court of Arbitration in the *Palmas* case rejected the plea that title arises from contiguity and observed: "Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive International Law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra-firma* (nearest continent or island of considerable size)." The fact that the State exercises its sovereignty over the island is a determining

1. Oppenheim—International Law Vol. I Page 456.

factor. The same court laid down that it is "the actual continuous and peaceful display of State functions" that constitutes a "natural criterion of territorial sovereignty." If a State performs State functions or exercises sovereignty over a certain island and this State of affairs is continuing for some time, the natural inference will be that the island belongs to that State.

Jurisdiction over continental shelf.—In 1945 the President of the United States made a proclamation with respect to the sub-soil and sea bed resources of the continental shelf. This proclamation justified the exercise of jurisdiction over the natural resources of the sub-soil and sea bed of the continental shelf by the contiguous nation. The end in view was that the United State could be able to utilize the new sources of petroleum and other minerals that were believed to underlie many parts of the continental shelf. By this proclamation the United States asserted its right to exploit oil and other mineral resources in the submarine continental shelf outside the three mile limit upto a water depth of six hundred feet. This proclamation marks an attempt to depart from the three mile limit and to extend the jurisdiction over a part of the high sea.

The Doctrine of Hot Pursuit.—The Doctrine of Hot pursuit which enables a State to pursue immediateiy upon high sea a vessel which has committed an offence within the maritime belt is well established in International Law. This pursuit on the high seas beyond the maritime is justified by HALL on the ground that it is in continuation of an act of jurisdiction which has been begun or which but for the accident of immediate escape would have been begun within the territory itself and it is neccessary to pursue it in order to enable the territorial jurisdiction to be efficiently exercised.

The doctrine of hot pursuit implies that a State is justified in pursuing a vessel upon the high seas till it is overtaken and seized if the pursuit was commenced before the vessel had actually escaped from the territorial waters and is continued without interruption. State cannot plead the doctrine of hot pursuit in defence if it lies by for days and weeks after the escape of the vessel which was guilty of committing an offence while within the territorial waters. The privilege of hot pursuit ceases as soon as the vessel sought to be seized reaches the territorial water of a third State or its own State. The case of the *I'm Alone* illustrates

the abuse of the doctrine of hot pursuit. This vessel belonging to a Shipping company of Nova Scotia was sunk by the American vessel at a distance of more than 200 miles from the coast of the United States. This pursuit was held not to be justified by any principle of International Law.[1]

Gulfs and Bays.—Gulfs and bays are either territorial or non-territorial. Territorial gulfs and bays are those which are enclosed by land of one and the same littoral State and have an entrance of not more than six miles wide from the sea. Non-territorial gulfs and bays are those which though enclosed by the land of the same littoral State have an entrance too wide to be commanded by coast batteries erected on one or both sides of it and also those gulfs and bays which are enclosed by the land of more than one littoral States.

There is however some controversy on the question whether the gulfs and bays enclosed by the land of a single littoral State and having an entrance more than six miles wide yet not too wide to be commanded by coast batteries are territorial. The Permanent Court of Arbitration at the Hague in the case of *North Atlantic Coast Fisheries* (*1910*) did not agree with the contention that only bays with an entrance not more than six miles wide were to be regarded as territorial. As there is divergence of opinion on this point it is not possible to regard many gulfs and bays territorial.

The non-territorial gulfs and bays are open in time of peace and war to vessels of all nations including men-of-war. The littoral State is not empowered to regulate the mode of fishing in these gulfs and bays by its municipal laws. The littoral State is however competent to reserve the right of fishery in territorial gulfs and bays for its own subjects.

8. **Straits**—Straits which divide the land of one and the same State and which are not more than six miles wide are territorial straits. Also straits more than six miles wide which can be commanded by coast batteries created on one or both sides of the straits are also territorial. But straits which divide the land of two States belong to both those States, the boundary line running through its mid-channel.

In territorial straits which open on the high sea the littoral State must allow passage to foreign merchant-men

1. (1933 : 1935) 3 Reports of International Arbitral Awards, p. 1609.

and men-of-war. The right of fishery may be reserved exclusively for the subjects of the littoral State. A littoral State enjoys the same jurisdiction over the territorial straits as it does over the maritime belt. Each of the two littoral States exercise jurisdiction over straits which divide their land.

Bosphorus and Dardanells.—These are two important territorial straits connecting the Black Sea with the Mediterranean. The Black Sea was formerly enclosed by Turkish Territory and these Straits were not open to vessels of foreign States. The Bosphorus and the Dardanelles were opened to Russian merchant-men as a result of the Treaty of 1774. These were open to foreign merchant vessels on the conclusion of Treaty of Paris of 1856. Foreign men-of-war were however excluded. The Treaty of Lausanne of 1923 made elaborate provisions for the neutralization of these straits and for freedom of navigation through them. The convention of Montreux of July 20, 1936 provided that the straits were open to merchant vessels of all nations in time of war and peace. It was however laid down that the vessels of States at war with Turkey may be refused navigation over these straits. Detailed rules for the passage of vessels through these straits in peace as well as in war were mentioned in the convention. The need for revision of this convention as however felt at the Potsdam Conference of 1945 but so far no agreement has reached.

The Open Sea.—The open sea does not belong to any State. Every State has a right of passage over the open sea and every State is entitled to exercise its jurisdiction on board its own ships. A vessel sailing on the open sea is in the eye of law a floating part of its own State. The State under the flag of which a ship sails on the open sea has exclusive jurisdiction over the ship and no other State has a right to exercise any coercive power over it. Whatever happens on the vessel sailing on the open sea has to be regulated as happening on the territory of the State under the flag of which a vessel is sailing and no other State has a right to interfere in it. Cases in which a State may interfere with the vessel of another State sailing on the high sea are :—

(1) A foreign merchant-man violating the laws in the territorial waters of another State may be pursued by the littoral state on the open sea and seized for a trial.

(2) Every State has a right to seize and bring to trial a foreign vessel illegally sailing under its flag.

(3) A belligerent State has a right to seize a neutral merchantman for breach of blockade or for carriage of contraband.

(4) Every State has a right to seize piratical vessels.

Subject to the above exceptions the freedom of the open sea is guaranteed by International Law. It is now well recognised that no part of the open sea can be subject to the supremacy of any State.

Air Space.—On account of the importance of air ships the air space has come in for controversy and different theories exist with respeet to supremacy over the air space. The air space over the open sea and the unoccupied territory is on all hands regarded as quite free and open but with regard to the air space over the occupied territory jurists are not unanimous. Some jurists are of opinion that air space over the occupied territory is free and open to all while others think that the air space upto a certain limit, that is to say, in a lower zone belongs to the subjacent state while in the higher zone it is only free. There is a third group of writers who maintain that the air space to an unlimited height belongs to the subjacent State and the fourth group of jurists are of opinion that the air space to an unlimited height is within the supremacy of the subjacent State subject to servitude of innocent passage for foreign civil air craft.

Up to the outbreak of the First World War the practice of States approved the theory that the air space over the territory of national and territorial waters of a State is within the exclusive supremacy of the subjacent State and this supremacy is not subject to, any servitude of innocent passage for foreign aircraft and the right of the foreign State to claim a passage for its aircraft.

Aerial Navigation Convention of Paris (1919).—This convention attempted to lay down rules for aerial navigation in times of peace, but did nothing to regulate navigation through air spaces during war. The right of the belligerents or the neutrals to exclude foreign aerial navigation through the air spaces of their territories remained unaffected. This convention recognised the principle that every power has complete and exclusive sovereignty over the air space over its territory. The signatories to the convention undertook to allow innocent passage in time of peace through their air spaces to the aircraft of the contracting parties This convention authorised the parties to prohibit the passage of the aircraft

for military reasons or in the interest of safety. Some of the important provisions made by this covention are :—

(1) Aircrafts are required to be registered in the State of which their owner is a national ;

(2) Aircrafts are to bear their nationality and registration marks and the names of residence of their owners ;

(3) Every private aircraft is to carry a certificate of registration, certificate of air-worthiness of the State to which it belongs, certificate of competency and licences in respect of each member of the operating crew, a list of passengers, bills of lading and manifest for freight if any and log book ;

(4) the establishment of International airways is subject to the consent of the States flown over ;

(5) the authorities of the territorial State have the right to visit every foreign private aircraft and verify its documents upon landing and upon departure ;

(6) Military aircrafts are not to fly over or land in the territory of another State without authorisation. The Convention provided for the establishment of an International Commission for Air Navigation under the direction of the League of Nations. The function of the Commission was to receive and make proposals for the amendments of the Convention and to collect and publish information on aerial navigation.

This Convention paved the way for further conventions between the signatories and other States which were not signatories to it for the purpose of facilitating aerial intercourse.

Warsaw Convention (1929).—This Convention for the unification of certain rules regarding International Air Transport was signed at Warsaw on October 12, 1929. The object which this convention had in view was to bring uniformity in the rules regulating the conditions of International carriage by air with regard to documents of carriage and the responsibility of the carrier. It laid down elaborate rules with regard to passengers of the aircraft, luggage carried by aircrafts and liability of carriers.

International Civil Aviation Conference (1944).—It would appear that the Convention of 1919 did not settle all the

problems connected with aerial navigation. While the Second World War was still going on, representatives of fiftyfour States met at Chicago at a Conference for the purpose of laying down rules for the regulation of civil aviation. The Convention of Civil Aviation which was adopted at this conference is described as the 'constitution for the post war global air world' and is an improvement on the Convention of 1919. This Convention came into force in April 1947 and had become binding on fifty-three States by August 1947. It reaffirms the principle that a State has extensive sovereignty over the entire air space over its territoıy. It provides for comprehensive rules regulating civil aviation.

In addition to the convention on civil aviation the conference adopted three important agreements :—

1. **An Interim Agreement on International Civil Aviation**.—This agreement was adopted as an interim measure because it was expected that much time would elapse before the convention on civil aviation could be ratified. This agreement contained the same rules regulating civil aviation as are embodied in the convention. It also provided for the establishment of an interim International Civil Aviation Organisation consisting of an assembly, a council and such other bodies as may be necessary. In 1947 this organization became permanent. The object of this organisation is to develop international aviation. Its duty is to set up committees for the purpose of collecting information on civil aviation and to make recommendation for the development of the principles and technique of international air navigation. The International Civil Aviation Organization has done much to develop legal as well as technical rules relating to civil navigation.

2. **The International Air Services Transit Agreement.**—This agreement provided for "**two freedoms**" in respect of scheduled international air services. By this agreement each contracting party granted to the other contracting parties the privilege to fly across its territory without landing and the privilege to land for non-traffic purposes.

3. **The International Air Transport Agreement.**—This agreement provided for five freedoms so that each contracting party granted to the other contracting parties (i) the privilege to fly accross the territory of a State without landing, (ii) the privilege to land for non-traffic purposes, (iii) the privilege to put down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses (iv) the privilege to take on passengers

mail and cargo destined to such territories (v) the privilege to take on passengers, mail and cargo destined for the territories of any other contracting State and the privilege to put down passengers mail and cargo coming from any such territory.

Wireless communication.—State in the exercise of its exclusive sovereignty over the air space over its territory has the right to prohibit the disturbance of its air space by wireless communication. The first attempt to regulate the transmission of messages by wireless telegraphy succeeded in adopting an International Wireless Telegraphy Convention of Berlin in 1906. This Convention provided for exchange of wireless telegrams between coastal stations and stations on shipboard. This Convention was superseded by the International Wireless Convention of 1912. In 1927 at the International Radiotelegraph Conference an International Radio Convention was agreed upon between the representatives of seventyeight Governments. The Madrid Telecommunication Convention of 1932 laid down elaborate rules for the regulation of the wireless transmission through air spaces of the contracting parties. An International Telecommunication Union was also established at Bern for the purpose of studying problems connected with telecommunication services. Under the auspices of the Union a new Tele-communication Convention was signed in 1944 regulating wireless communication from a foreign source.

Boundaries.—State territory has its limits and the boundaries of a State territory circumscribe the sphere within which a State has to exercise its supermacy. A boundary is stated to be an imaginary line separating the territories of two States. "A boundary is not merely a line but a line in a borderland. The borderland may or may not be a barrier. The surveyor may be most interested in the line. To the strategist the barrier, or its absence, is important. For administrator, the borderland may be the problem, with the line the limit of his authority."[1] Oppenheim defines boundaries as "the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the open sea." The boundaries of State territory are necessary for

1. Jones—Boundary—Making (1945), p. 7.
2. Oppenheim—International Law Vol. I (Seventh Edition) p. 483.
3. Annual Digest 1929-30 Case No, 5.

the purpose of indicating the exact limits within which a State has to exercise its sovereignty. The absence of fixed boundaries of a State territory has no effect on the State or its sovereignty. The Germano—Polish Mixed Arbitral Tribunal held that Statehood is not absolutely dependent on the existence of rigidly fixed boundaries.

Natural and artifical boundaries.—State boundaries are either natural or artifical. Mountains, rivers, rocks, deserts and forests which separate the territories of two States constitute natural boundaries. Artificial bonndaries are such signs as are purposely erected to mark the boundary line. These signs are indicated by posts, stones, walls, trenches, roads, canals and the like. The ancient Romans used to construct walls to serve as boundary lines. The boundaries of a State territory are generally fixed by means of treaties. The Peace Conference of 1919 adopted the method of specifying boundaries in words and left the actual delimitation to Boundary Commission which was to mark the actual boundaries in accordance with the agreement embodied in the Treaty.

Water boundaries present difficulties in the absence of a treaty. When two States are separated by a river, the boundary line is not generally fixed but it shifts with the course of the river. When the river is not navigable the general rule is that boundary line runs through the middle of the whole course of the river. If the boundary river is navigable the boundary line goes through the middle of the Thalweg, *i. e.*, the mid-channel of the river.

Hyde States the law thus.[1]—"It has long been agreed that when a navigable river forms the boundary between two States, the dividing line follows the Thalweg of the stream " The Thalweg, as the derivation of the word indicates, is the down way or the course followed by vessels of largest tonnage in descending the river. That course frquently, if not commonly, corresponds with the deepest channel. It may however, for special reasons take a different path. Wheresoever that may be such a course necessarily indicates the principal artery of commerce, and for that reason is decisive of the Thalweg." The principle of the Thalweg was recognised by the United States Supreme Court. In the case of *Louisiana* v. *Mississippi*, (202 U. S. I) the Supreme Court defined Thalweg thus "The term Thalweg is commonly used by writers on Inter-

Hyde : International Law Vol. I p. 444.

national Law in definition of water boundaries between States meaning the middle or deepest or most navigable channel." Again, in the case of *New Jersey* v, *Delaware*, (291 U. S. 361) the Court in recognising the principle of Thalweg said : "International Law today divides the river boundaries between States by the middle of the main channel, when there is one and not geographical centre, half-way between the banks............it applies the same doctrine now known as the doctrine of the Thalweg, to estuaries and bays in which the dominant sailing channel can be followed to the sea." Numerous treaties both in Europe and America have recognised the doctrine of the Thalweg. The treaty of peace with Germany of June 28, 1919 accepting this principle made it clear that the dividing line in the case of the boundary formed by a non-navigable river was the middle line of the waterway and that in the boundary formed by a navigable river was the medium line of the principal channel of navigation.

It is also settled that when a navigable river forms the boundary between two States, it is not permissible for either State to alter by any artificial means the course of the Thalweg. The islands that emerge in the boundary river some times raise difficult problems. The principle of the Thalweg in the case of islands in the non-navigable rivers and that of the middle stream in the case of islands in the non-navigable rivers are fully appliciable. The island in the navigable river belongs to the State on whose side of the Thalweg it exists. It belongs to the State on whose side of the middle line of the non-navigable river it is situated. If the island has been formed suddenly, in the middle of the principal channel to Thalweg, it belongs equally to the two riperian States. In case the island by imperceptible and slow change of the Thalweg goes from one side to the other, the ownership of the State on whose side it formerly was remains intact. But the State on whose side the island comes by change has right to exercise control over the island.

When Lakes and land-locked seas separate the two States the boundary line runs through the middle of the lakes and land-locked seas. In case of straits the boundary line runs through the middle of straits.

Mountains separating two States may either belong wholly to one State or may be jointly owned by the two States separated by them. When a mountain belongs jointly to the two States the boundary line, in the absence of an agreement, runs on the mountain ridge along with the watershed.

Boundary Disputes.—Boundary disputes among States are not infrequent and when they occur, difficult problems arise for solution. These disputes are generaly settled through diplomatic negotiations, through agreements or through arbitration by consent of the disputants. When the contending States agree to arbitration, they usually lay down principles which may guide the arbitrators or the arbitral tribunals in settling the controversy. In these disputes the difficulty lies in drawing the dividing line between the territories of the contending States. Sometimes experts are employed to facilitate the work of the parties or the arbitrators. Convention are also sometimes arrived at between parties for the settlement of such disputes. In their dispute relating to boundary the United States and Mexico entered into the convention of 1882 whereby an International Commission was appointed to draw the dividing line. To democrate the boundary between the United States and Canada the Convention of April 11, 1908 came into existence.

Most of the boundary disputes in Europe and America were settled by means of conventions. Peace treaties in Europe have also brought settlement of many a boundary disputes. The Treaty of Westphalia of 1648, that of Vienna of 1815 and the Peace Treaties of 1919-1920 embody decisions on boundary disputes. In Africa boundary disputes were settled through conventions. Asian States usually entered into conventions for settlement of their boundary disputes.

A recent boundary dispute was that between India and Pakistan. A demarcation of the boundary between East Bengal in Pakistan and West Bengal in India and also between Assam and East Bengal was required to be made. The two countries agreed to arbitration which resulted in the Redcliffe Award of 1947. After the award a Bouudary Disputes Tribunal known as Bagge Commission was appointed to interpret the award and draw the dividing line.

Geographical situation of a country forms an important consideration in a matter relating to boundaries of States. Maps have frequently been used as evidence in cases involving a dispute relating to boundaries. They have been of great assistance in fixing boundaries. The maps that are to be relied upon must truely portray the existing situation of land and water, and must be based upon an accurate survey. The accuracy of map does not only depend upon an accurate survey but also on the impartiality of their makers. The official maps, that is to say, maps prepared under the directions

of a State or by a department of the State, serve a very useful purpose. These official maps are expressions of the pretensious of the State with regard to the extent of its territorits and tend to limit the scope of the dispute. The Judicial Committee of the Privy Council in the case of Canada—Newfoundland-Boundary Dispute (1927) observed : " The maps were referred to, even when issued or accepted by departments of the Canadian Government, cannot be treated as admissions binding on their Government, for even if such an admission could be effectively made, the departments concerned are not shown to have had any authority to make it. But the fact that throughout a long series of years, and until the present dispute arose, all the maps issued in Canada either supported or were consistent with the claim now put forward by Newfoundland, is of some value as showing the construction put upon the Order in-Council and Statutes by persons of authority and by the general public in the Dominion" The evidentiary value of the maps in such dispute is great for they do not only accurately portray the geographical situation but also show the extent of the territory over which the disputants pretend to exercise control. This value depends upon the authenticity and the reliability of the map produced in evidence.

In the settlement of a boundary dispute it is always necessary to enquire into the extent of the area of control exercised by each of the contending States. The fact that a State has been exercising effective control over a certain area of land or water for a long number of years furnishes good evidence for ascertaining the limits of the territory. Possession is a great determining factor both in International Law as in the Private law. What a State has been in possession of for a sufficiently long time must in all probability belong to it. The doctrine of *uti possidetis* borrowed from the Roman law has influenced the decisions in innumerable boundary disputes of States both in Europe and America. It has been of particular help in disputes among States which had been parts of a former single State. The exercise of sovereign power over a particular area of land or water determines possession in international sphere and forms an important consideration in disputes about boundaries. Professor Huber in the *Palmas case* (1928) observed : "Just as before the rise of International Law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so, too, under the reign of International Law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States."

The rule *Quieta non movere* is a mere corrollary deduced from the doctrine of *uti possidetis* :—This rule has also been applied to boundary disputes. The rule means that. a settled State of affairs should be disturbed as little as possible. The Permanent Court of Arbitration in the case of Grisbadarna (1909) between Norway and Sweden applied this rule in determining the question of title to the maritime territory. It observed. "It is a settled principle of the Law of Nations that a state of things which actually exists and has existed for a long time, should be changed as little as possible."

The American Doctrine of Uti Possidetis.—The full expression, *uti possidetis, ita possideatis* means 'as you possess so may you possess. It is a Roman Law doctrine which has been introduced into International Law. In Roman Law the doctrine was employed by the *Praetor* to forbid disturbance of existing possession of an individual. This doctrine was of particular assistance in disputes over boundaries between States having a common descent, for it furnished a safe basis for delimitation of frontiers after the common sovereign power was withdrawn. In the opinion concerning the questionof Boundaries between the Republics of Costa Rica and Panama (1913) it was observed: "When the Common Sovereign power was withdrawn, it became indispensably necessary to agree on a general principle of demarcation since there was an universal desire to avoid resort to force, and the principle adopted was the colonial *uti possidetis* ; that is the principle involving the preservation of the demarcations under the colonial regimes corresponding to each of the colonial entities that was constituted as a State." The principle of *uti possidetis* came into so much vogue in America that it was adopted by some States in their Constitution and treaties which aimed at settlement of boundary disputes. The Constitution of Vene Zuela declared that the boundary of Vene Zuela comprised "all that which previously to the political changes of 1810 was denominated as Captain—Generalship of Vene Zuela." The Treaty of Alliance between Peru and Chile of April 26, 1823 expressly laid down that the territory of Peru extended to all that which was comprised in the viceroyalty of Peru in January 1810. Similarly, in the Treaty of Peace between Colombia and Peru of September 22, 1829 the parties agreed to recognise "as the limits of their respective territories these that the ancient viceroyalties of New Granada and Peru held before their independeuce." Again, Argentine and Chile in the Treaty of Friendship of August 30, 1855 agreed to recognise "as the limits of their respective territories those which they possessed as such at the time of their

separation from the Spanish dominion in 1810." The Constitution of Costa Rica declared that the limits of the territory were those of *uti possidetis* of 1826.

The General Arbitration Treaty of November 21, 1901 between Bolivia and Peru provided that the arbitrators would decide the dispute in accordance with the principles of International Law and on questions relating to boundary in strict obedience to the principles of *uti possidetis* of 1810. In referring their dispute the Dominion Republic and Haiti to the arbitration of Pope in 1895 it was affirmed that the principle of *uti possidetis* had been conventionally accepted and established for the demarcation of the boundary between them.

Concept of State Servitudes.—The concept of State servitude has been imported from private law into the international order and has produced much confusion. It has been well said, "of all attempts to apply to relations between States conceptions taken from private law, none has caused more confusion or has brought the recourse to analogy into more disrepute than the efforts made to introduce the conception of servitude into international public law". The concept of the State Servitudes is of recent origin and it was not until the early twentieth century that State servitudes found a secure place among the topics of public International Law.

In the case of the *North Atlantic Coast Fisheries Arbitration* (1910) the United States of America relying upon Article 1 of the Convention of 1818 contended that the grant in her favour of the right of fishing by Great Britain constituted an international servitude over the territory of Great Britain with the result that Great Britain was deprived of her independent right to regulate the fishery. The Permanent Court of Arbitration disagreeing with the American contention observed that there was no evidence that the doctrine of international servitude was one with which either American or British Statesmen were conversant in 1818, no English publicists employing the term before1818.' It also rejected the plea that the grant of liberties of fishery did not involve derogation from the sovereignty of Great Britain for it said : "Because a servitude in International Law predicates an express grant of a sovereign right and involves an analogy to the relation of a praedium dominions and a praedium serviens, whereas by the treaty of 1818 one State grants liberty to fish which is not a sovereign right, but a purely economic right, to the inhabitants of another State." As to the origin of the concept of servitudes the Court observed : "the doctrine of international servitude in the sense

which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *dominiterrae* were not fully sovereigns; they holding territory under the Roman Empire, subject at least theoretically and in some respects also practically, to the courts of that Empire, their right being moreover, rather of a civil than of a public nature, partaking more of the character of *dominium* than of *imperium* and therefore certainly not a complete sovereignty." The ground for rejecting the contention was stated to be : "Because this doctrine being but little suited to the principle of sovereignty which prevails in States under the system of Constitutional Government............ and to the present international relations of Sovereign States,has found little, if any, support from modern publicists. It could therefore in the general interest of the community of nations and of the parties to this treaty, be affirmed by this tribunal only on the express evidence of international contract."

Oppenheim however points out that the Permanent Court of Arbitration was prepared to accept the principle of State servitude but it demanded an express grant to prove the alleged claim to State servitudes. In a later case "*The Wimbledon*" (1923) wherein the Permanent Court of International Justice by a majority did not accept the contention that the right of passage through the KIEL CANAL was a State servitude for it observed : "The Court is not called upon to take a definite attitude with regard to the question, which is moreover of a very controvertial nature, whether in the domain of International Law, there really exitsts servitudes analogous to the servitudes of the Private Law."[1]

Although the concept of servitudes has come to stay in International Law, the occasions for its application are very rare. In the two cases cited above the plea of the doctrine of Sevitudes was not accepted. Exceptional are the cases in which servitudes in the sense of the private law as rights in *rem* may be claimed. The concept is of doubtful utility. Starke observes : "Initially, the doctrine of international servitudes was imported from the private law and many authorities are of opinion that its translation to international field has not been a success. There are strong grounds for suggesting that the doctrine is not really a necessary one and that International Law can quite well dispense with its application."[2]

1. Fenwick—Cases on International Law p 526.
2. J. G Starke : Introduction to International Law p. 175.

Brierly, is of the opinion that there is no real evidence of the fact that International Law recognises rights over territory which correspond to the servitudes of Roman or the easements of the English Law. He observes : "The test of an International servitude can only be on the analogy of private law, that the rights should be one that will survive a change in the sovereignty of either of the two States concerned in the transaction. There is no real evidence that any such right exists in the International system."[1] He maintains 'that if State servitudes are not rights in *rem* and can not survive the change in the sovereignty of the State concerned it is confusing to call such a right an International servitude.'[1]

State Servitudes and their definitions.—*Oppenheim* defines State servitude as "those exceptional restrictions made by treaty on the territorial supremacy of the State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State."[2] The restrictions imposed by International Law on the territorial supremacy of a State do not constitute State servitudes which arise from an agreement between the State. State servitudes are attached to a part or whole of a territory of a State and are rights *in rem*. State servitudes operate to restrict the supremacy of a State with respect to a part or the whole of its territory which is made to serve the purpose or the interest of another State. No servitude exists with regard to a territory which belongs to no country and for this reason the high seas are not subject to State servitudes. Those limitations on territorial sovereignty which do not make a part or whole of the territory of a State to serve the purpose or interest of another State are not State servitude.

State Servitudes go with the territory and do not exist apart from it.

Pitt Cobbett describes servitudes thus : "Apart from the grant of ownership or possession, one State may grant to another certain rights over or in relation to its territory which confer on the grantee a strictly defined right of user, or impose on the grantor some definite restraint on user in favour of the grantee. Such rights when they are in their nature real as distinct from personal, and of such a kind as would on the principles previously indicated be binding on the successor in cases of cession or annexation are commonly styled 'International Servitudes."[3]

1. Brierly : Law of Nations p. 160.
2. Oppenheim—International Law Vol. I (Seventh Edition) p. 487.
3. Pitt Cobbett.—Cases on International Law Vol I p. 116-117.

Kinds of Servitudes :—

1. Affirmative Servitudes.—When a State grants a right to another State or its citizens to perform certain acts on its territory or on a part of it, it creates a State servitude, of the positive or affirmative character. Affirmative Servitudes require some act to be done on the territory of the State which agrees to the doing of such act. The right to set up a railway line, to construct custom houses and the right to keep troops in a fortress on the territory of another State constitutes affirmative servitudes.

2. Negative Servitudes.—These impose a duty of abstention and the State subject to negative servitudes is bound to abstain from doing some act. The existence of the negative servitude give a right to one State to ask the other State not to perform some acts in the exercise of its territorial supremacy. According to *Oppenheim* negative servitudes are "such as give a right to a State to demand of another State that the latter shall abstain from exercising its territorial supremacy in certain ways".[1] A right to demand that another State shall not permit entrance of foreign vessels into its ports arises from Negative Servitudes.

3. Military Servitudes.—State servitudes which are required to serve military purposes of a State are military servitudes. The right to keep troops in a foreign territory amounts to military servitude.

4. Economic Servitudes.—Economic servitudes are those "which are acquired for the purpose of commercial interests, traffic and intercourse in general, such as the right of fisheries in foreign territorial waters to enjoy the advantages of free zone for customs purpose, or of free navigation on a river, to build a railway on or lay a telegraph cable through foreign territory, and the like."[2]

5. Extinction of State Servitudes—State servitudes are created by treaties. They become extinct on the dissolution of the treaties which create them. It is obvious that State servitudes are extinguished by mutual agreement of the parties. A State in whose favour the State servitudes operate can renounce its right to claim them. This renunciation may be either express or implied.

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1. Oppenheim—International Law Vol. I (Seventh Edition) p. 492.

2. Oppenheim—International Law Vol. I (Seventh Edition) p. 493.

CHAPTER XIII

RIGHTS IN INTERNATIONAL WATER WAYS

1. International Waterways Defined —As already stated that are waters which do not exclusively belong to a particular State but are treated as belonging to the whole world The expression 'International rivers' was according to *Hennig* first used in the Treaty of Peace with Germany of 1919 Part XIL and has since been adopted by nations. *Oppenheim* makes a four-fold classification of rivers, namely, national, boundary, not-national and international. Other writers make a two-fold classification namely, national and international. *Oppenheim* defines international rivers as those which "are navigable from the open sea, and at the same time either separate or pass through several States between their sources and their mouths." He states that these rivers while belonging to the different States concerned are called International rivers, "because freedom of navigation in time of peace on all such rivers in Europe and on many of them outside Europe for merchantmen of all nations is recognised by conventional International Law."

There are lakes and land locked seas which are international. Those lakes and land-locked seas which while being surrounded by the territories of several States are navigable from the open sea are international. The case of canals is however quite different. Canals being artificially constructed waterways are parts of the territories of the State or States which are responsible for their construction. They cannot strictly be international ; but since they have an international character by arrangements they are sometimes called, though erroneously, International canals.

2. History of International Waterways.—The Law relating to International Waterways is of recent growth. What are now called International rivers were till the French Revolution regarded by the riparian States as their exclusive territories. The riparian States claimed the right of excluding foreign vessels from navigating on those parts of the rivers which ran through their land territories. Navigation on these rivers was allowed to foreign vessels under a treaty or an arrangement entered into with the riparian States It was only after the river *Scheldt* was opened to the vessels of all the riparian States under the decree of the French Convention of November 16, 1792 that a movement for freedom of navigation on inter-oceanic rivers started. The Congress

of Rastadt of 1804 between France and the Holy Roman Empire substituted uniform tolls and regulations for those previously existing in respect of the Rhine river. The Final Act of the Congress of Vienna 1815 established the Central Commission of the Rhine for the purpose of supervising the navigation of the Rhine and for promoting the security of the traffic in that river. The Congress of Vienna of 1815 accepted the principle of free navigation of all vessels on International rivers of the Western Europe. The Congress further decided that the tolls that were to be levied on those rivers was to be fixed with the common consent of the riparian States. As a result of the decision of the Congress of Vienna several rivers including the Rhine and the Elbe were opened for free navigation on payment of toll at a rate proportionate to the expenditure incurred by the riparian States upon those rivers. This freedom of navigation was however confined to the vessels of the riparian States and was not enjoyed by other States. The lead in this direction was given by the Treaty of Paris (1856) which declared the Danube open to the vessels of all nations. The Treaty also set up the European Commission to see to the maintenance of the navigation on the Danube. In 1922 on the adoption of the new Danube Statute an International Commission came into existence for supervision and for certain other matters.

In America a similar movement was afoot in respect of the great arterial rivers of the American continent. After Americans had won their independence Spain held exclusive control of both the banks of Mississippi at its mouth and excluded American vessels from navigation over that part of the river. The American Government resented this attitude and asserted that its citizens had a right of free navigation to the sea. After long negotiations between the two Governments the settlement was reached at the Treaty of San Lorenzo el Real (1795, which allowed as a concession free navigation to American vessels from the source to the mouth of the Mississippi. Another event concerned the St. Lawrence which passed through Canadian territory. Great Britain held exclusive control of that part of the St. Lawrence which ran through Canada. The American Government claimed a right of free passage on this river throughout. The negotiations in respect of this controversy ended in the Reciprocity Treaty of 1854. This Treaty allowed free navigation of American vessels on the St. Lawrence and also secured free navigation of British vessels on the American Lake Michigan.

According to the terms of the Reciprocity Treaty the British Government reserved its right to revoke the concession after due notice. Thereafter in 1871 the Treaty of Washington brought about a permanent arrangement by which the American vessels were allowed freedom of navigation through that part of the St. Lawrence which passed through Canada, and the Yukan, and the Porcupine and the Stikine.

In South America international rivers had been declared open to vessels of all nations by agreement as well as by unilateral act of the controlling power. The Panama and the Paraguay were thrown open under a Treaty of 1853 between England, France and the United States of America on one side and the Argentine Confederation on the other while the Emperor of Brazil by his decree of 1867 declared the Amazon open to the vessels of all nations. In Africa the Final Act of the West African Conference of 1885 directed that the Congo, and the Niger with their tributaries and nearly all the rivers of the Free Trade Zone as described in its Article I be freely open to the merchant ships of all nations.

In Europe the Peace Treaties that were concluded as the result of the First World War declared many European rivers international and open to the ships of all nations. In pursuance of these Treaties parts of Elbe, of the Ultava, of the Oder, of the Niemen, of the Morava, of the Theiss, of the Vistula and of the Pruth and the Danube upto Ulm including the then projected Rhine-Danube waterway became international in character and thus open for the vessels of all nations. The internationalization of these rivers marked a definite development in the law relating to freedom of navigation on inter-oceanic rivers. Many steps were taken to safeguard this freedom of navigation on these rivers. A Statute of Navigation was signed on February 22, 1922 in respect of the parts of the Elbe which had been declared international for the purpose of ensuring freedom of navigation and equality of treatment. An International Commission for a similar purpose was set up in relation to the Oder. The Treaty of Peace with Germany contained terms safeguarding the freedom of navigation to vessels of all nations on the Rhine and the Moselle.

The League of Nations summoned a Conference in 1921 for the purpose of drawing up a general convention which had been envisaged in the Peace Treaties. The Conference met at Barcelona and was attended by the representatives of forty

States. At this Conference which was not attended by the United States of America, the Argentine Republic, Russia and Turkey a 'Convention and Statute on the Regime of Navigable Water Ways of International Concern' was arrived at. Many States have ratified it and many have acceded to it. The parties to the Convention agreed to allow free exercise of navigation to the vessels belonging to them on those parts of the Navigable Water Ways which may be situated under their sovereignty or authority. This Convention provides the conventional law relating to International Water Ways. The League of Nations for the purpose of safeguarding the principle of freedom of navigation on International Water Ways created an Organization for Communication and Transit. The Treaty of Lausanne of 1923 announced that the High Contracting Parties were agreed "to recognise and declare the principle of freedom of transit and of navigation by sea and by air in time of peace as in time of war, in the Strait of Dardanelles, the Sea of Marmora and the Bhosphorus." This was followed by the Montreux Convention of 1936 by which the supervision and control of the Straits of Dardenelles, the Sea of Marmora and the Bhosphorus was secured. The principle of freedom of navigation in the Straits was recognised and reaffirmed. In 1930 a Conference under the auspicies of the Organisation for Communications and Transit was held and it produced a number of Conventions, namely, relating to collisions between vessels engaged in inland navigation, to the registration of inland navigation and to the registration of ships and their flags. Before the second World War broke out only a few States had ratified these Conventions. The second World War obstructed the progress made by the League in making the river laws uniform and in establishing the rule of freedom of navigation. The position on the eve of the war was that many Conventions had not been ratified with the result that the rule of freedom of navigation on all the rivers had not become firmly settled.

In 1947 the International Congress of River Transportation was held at Paris to discuss various matters. As one of the results of this Congress a clause was inserted in Peace Treaties with Bulgaria, Rumania and Hungary to the effect that navigation on the Danube other than traffic between ports of the same State would be free and open on a footing of equality. In 1948 a Conference met at Belgrade and produced a Convention providing for freedom of navigation on the Danube and for a Commission composed entirely of representatives of the riparian States.

The narration of the chief historical facts shows that the

law relating to navigation on international waterways has its source in the various international arrangements. The various conventions, treaties and other arrangements made to safeguard freedom of navigation on international waterways reveal the anxiety of the States throughout the world to place restrictions on individual sovereignty of riparian States for the good of all nations.

3. The Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern.— At the invitation of the League of Nations a Conference of the representatives of forty States met at Barcelona in March, 1921. The Conference produced a Convention and Statute on the Regime of Navigable Waterways of International Concern in persuance of Article 338 of the Treaty of Versailles. The Convention of which the Statute was the integral part was signed on April 20,.1921.

Article 1 of the Statute defines waterways of international concern as :

1. All parts which are naturally navigable to and from the sea of a waterway which in its course, naturally navigable to and from the sea, separates or traverses different States, and also any part of any other waterway naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different States.

2. Waterways or part of waterways whether natural or artificial, expressly declared to be placed under the regime of the General Convention regarding navigable waterways of international concern either in unilateral Acts of the States under whose sovereignty or authority these waterways or parts of water ways are situated or in agreements made with the consent, in particular of such States.

The important provisions of the statute were :—

(*a*) The Contracting States agreed to allow freedom of navigation to the vessels of one or the other Contracting States on those parts of the navigable waterways which may be situated under their sovereignty or authority.

(*b*) It was declared that in the exercise of navigation the 'nationals, property and flags of all Contracting States would be entitled to a treatment of perfect equality and that no invidious distinctions would

be made between the national property and flag of the different contracting States or between the nationals, property or flag of riparian and non-riparian States'.

(c) There would be no levy of tolls anywhere in the course or at the mouth of waterways of international concern. It would be permissible to charge for services rendered in connection with navigation. Such dues are to be equitable and are simply to meet the expenditure incurred in maintaining and improving the navigability of the waterways. The tariff of such dues is to be prepared in accordance with the expenditure to be met with from such dues and it is to be posted at ports.

(d) The riparian States would have a right to take necessary steps for policing an area of the river under their sovereignty and to make necessary non-discriminatory regulations with regard to customs, public health and other kindred matters.

(e) The riparian States are to refrain from taking any step which may be likely to prejudice the navigability of the waterway or to minimize the facilities for navigation.

(f) The riparian States in the absence of any agreement to the contrary would he entitled to carry on their administration on that part of the waterway which is under their sovereignty.

(g) The Contracting States agreed not to apply among themselves such provisions of an earlier treaty or convention as may be in conflict with any of the provisions of the Statute.

(h) All disputes regarding the application or interpretation of any of the provisions of the Statute would be settled amicably between the disputants. If not amicably settled, they would be brought before the Permanent Court of International Justice.

(i) The Statute will not apply to a waterway of the international concern which belongs only to two riparian States and which separates for a considerable distance a Contracting State fom a non-Contracting State whose Government has been

accorded recognition by the former at the date of the Statute unless an agreement has been made between them to safeguard the interests of the Contracting States in respect of navigation on the waterway concerned.

Additional Protocol.—Certain signatories to the above Convention concluded an Additional Protocol on the same date. In addition to the rights disclosed in the Convention the signatories to the Additional Protocol further conceded on grounds of reciprocity without prejudice to their sovereignty and in time of peace that all navigable waterways and all naturally navigable waterways which are under their sovereignty and which are not of international concern, will be accessible to ordinary commercial navigation to and from the sea and that equal treatment would be given to the flags of all signatories to the Protocol as regards transport of imports and exports without transhipment.

4. The Final Act of the Congress of Vienna (1815)—The Final Act of the Congress of Vienna marked the first step towards freedom of navigation on European inter-oceanic rivers. The important principles formulated by it are :

(*a*) the navigation of the river separating or traversing different States should be free from the point at which it became navigable upto the sea.

(*b*) the riparian States would be entitled to levy tolls on navigation. The tolls will be charged at a rate which may not have the effect of discouraging commerce. The rates would be uniform and reasonable and would be fixed with the common consent of riparian States.

(*c*) the riparian States will have a right of policing the river and of making reasonable police regulations which will be such as may not discourage commerce.

(*d*) the aim of promoting and encouraging commerce will be kept in mind in making any arrangement with regard to navigation of vessels on the rivers.

5. Law relating to International rivers.—The network of conventions and treaties made by various States in Europe, America and Africa during the nineteenth century and the present establishes the principle of freedom of navigation to the

vessels of all nations on inter-oceanic rivers. It cannot as a matter of strict law be said that it is customary rule of International Law that there is freedom of navigation for all vessels on international rivers but the principle of freedom of navigation must be held to have been established. The various intenational rivers form the subject matter of treaties and whenever a dispute arises the terms of the treaty are generally invoked. Different writers have taken different views as to the state of law in this respect.

Oppenheim.—"After the first world war there took place important application of the principle of free navigation upon rivers, the essence of which is the admission of the flags of all States upon terms of equality and subject to the payment of such dues as are equitably required for maintaining and improving the conditions of navigation. The principle can not be described as a recognised rule of customary International Law, but the machinery now exists in the Barcelona Convention of 1921, whereby it is capable of becoming a world-wide principle of conventional International Law."[1]

Alvarez.—Dr. Alejandro Alvarez the eminent Chilean Publicist in his report as Chairman of the Sub-committee on Navigable Waterways at the Barcelona Conference summed up the law thus :—

"The principle of freedom of navigation on rivers has not evolved in the same manner in the American continent. Freedom of navigation on international rivers has been admitted there, not as an extension of the European principle, but as a concession accorded voluntarily by the riparian States through the medium of interpartes agreements or legislative acts..............

The differences between European and African Public Law on the one hand and American public law onthe other, as regards navigation on international rivers may be summed up as follows :—In Europe the principle of free navigation on international rivers is almost absolute, and is moreover, usually enunciated in the Conventions concluded between Great Powers. As regards the regime to which free navigation is subject, recourse has sometimes been had, in determining it, to Commissions which even include Delegates from non-riparian States. In the New World the question is governed by a number of conventions between riparian States,

1. Oppenheim : International Law Vol. I. P. 429.

and also by certain legislative provisions of these States. Thus it cannot be said that the principle of free navigation is in the position of a recognised principle there; moreover the system of administrative commissions is unknown. There are also other differences between European and American public law; in particular in America local transport is always reserved for the national flag."

Pitt Cobbett.—"(1) So far as relates to the right of navigation on the part of co-riparian States, the practice of States is perhaps sufficiently uniform to warrant the assertion of a right apart from treaty; although this right is at best only an 'imperfect right' and is even now not universally conceded. So, in 1906, the navigation of the Lower Nile was closed by Egypt to the passage of steamers for ports of the Congo Free State, situated on the upper Nile; nor does the legality of this proceeding appear to have been questioned. (2) Such a right, moreover, whether resting on convention or usage is certainly subject to such regulations as may be necessary to the safety or convenience of the territorial power so long as they are not inconsistent with free navigation. (3) So far as relates to the, right of navigation on the part of non-riparian States, this although often concluded by treaty cannot probably be claimed as a right founded on usage except under cover of the rights of the riparian States themselves."[1]

Starke.—"Several writers on International Law commencing with Grotius have been of opinion that there is a general right of passage for all States along such international rivers, but this view has never been generally accepted in practice, and is certainly not recognised as a customary principle of International Law. Even writers, who hold that there is freedom of navigation, differ in their interpretation of the extent of this right:—(*a*) Some writers hold that such right of passage is confined to time of peace only; (*b*) others assert that only countries through which an international river passes have a right of passage; (*c*) a third group maintains that the freedom of passage is without any limitation, subject only to the right of each State to make necessary and proper regulations in respect to the use of the river within its boundaries. In principle, the interpretation (*b*) is a reasonable one as States located on the upper portion of a river should not be debarred from access to the sea."[2]

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1. Pitt Cobbett—Cases on International Law Vol. I, P. 135.
2. Starke—An Introduction to International Law—P. 154—155.

6. The Case of International Commission of the River order (1929).—The Permanent Court of International Justice had to consider the principles laid down by the Final Act of the Congress of Vienna (1815) and later treaties. The Court named the principles declared by the Congress of Vienna as the Vienna principles. With regard to the Vienna principles the court stated: "In conformity with the provisions of the first Peace of Paris of May 30, 1814, the Final Act of the Congress of Vienna of June 9, 1815 provided that the Powers whose territories were separated or traversed by the same navigable river should regulate all that regarded its navigation by common consent, and should for this reason name commissions who should adopt as the basis of their proceedings certain principle laid down in the Act itself. The first of these was the principle that navigation of such rivers along their whole course, from the point where each of them became navigable to its mouth should be entirely free and should not in respect of commerce be prohibited to any one subject to uniform regulations of police. The rest of the principles mainly related to the uniformity of navigation rules, the exclusion of national customs houses, from interfering in the matter of navigation dues or from throwing obstacles in the way of navigation; the maintenance of navigable channels, and the keeping of touring paths in good repairs and the establishment of regulations of the police alike for all and as favourable as possible to the commerce of all nations. The arrangements once settled were not to be subject to change except with the consent of all riparian States." Coming to the Peace Treaties of 1919 and the Barcelona Convention and the Statute of the Danube the Court observed:

"In contradistinction to most previous treaties which limit the common legal rights to riparian States, the Treaty of Versailles and the other Peace Treaties which almost textually reproduce the essential provisions of the former Treaty, adopted the position of complete internationalization, that is to say, the free use of the river for all States, riparian or not. Article 332 grants freedom of navigation on waterways declared international in the previous Article to all Powers on a footing of perfect equality."

In answer to the question whether the States, parties to the Treaty of Versailles, were bound by the Barcelona Convention of 1921, the Court held that in view of Article 338 of the Treaty of the Versailles the convention referred to therein must be considered to be one which has been duly ratified and since Poland had not ratified the convention, it could not rely upon it.

As to the extent of internationality of a waterway the Court

observed: "that the internationalization of a waterway traversing or separating different States does not stop short at the last political frontiers but extends to the whole navigable river."

Conclusion.—It is therefore reasonable to conclude that the principle of freedom of navigation of all vessels on international rivers has found place in International Law by reason of the various general conventions and treaties. The right of States to free navigation on these rivers however exists under the Conventional Law and not under any rule of customary International Law. The disputes involving the right to freedom of navigation and allied matters are to be decided on an interpretation of the particular treaty or convention Since in respect of all international waterways of any importance there exist treaties and conventions, the absence of a rule of customary International Law does not seem to create any difficulty.

IMPORTANT INTERNATIONAL RIVERS

The Danube.—The principles of the Congress of Vienna came to be applied to the navigation of the Danube by reason of Article XV of the Treaty of Paris (1856) whereby it was agreed that the navigation would be free from all tolls and imports other than those provided for by treaty but subject to reasonable regulations of police and quarantine. It was fully agreed that there would be no obstruction to free navigation. The Treaty by its Art. XVI established a Commission known as European Commission for carrying out the programmes of free navigation on the Danube. The European Commission was to consist of one representative of each of the various States, namely, Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey. The Commission was charged with the task of executing such works at the mouth and elsewhere as were necessary to facilitate navigation of the river. Article XVIII of the Treaty further provided for the appointment of River Commission for the purpose of preparing regulations of navigation and police for removal of obstructions of all kinds in the way of application of Vienna principles and after the dissolution of the European Commission for the maintenance of mouth of the Danube and the parts of the adjacent sea in a navigable State.

The European Commission framed rules of navigation in 1858 but these rules were not accepted by the non-riparian States and the Commission then proceeded to make new rules. The works and establishments of the European Commission were neutralised in 1868. The Treaty of London of 1871 made

a revision of certain provisions of the earlier treaty but the arrangement that existed was maintained. The right of Turkey to send warships on the river was however reserved. The course of Russo—Turkish War of 1877 showed that the Danube was not regarded as neutralised. The belligerents however respected the works and establishments of the European Commission and did not completely obstruct the free navigation of the river. The life of the European Commission was extended from time to time.

The Treaty of Berlin of 1878 made important changes. In order to ensure freedom of navigation the Treaty directed that all existing fortresses and fortifications on the course of the river from the Iron gates to its mouth be razed and no new ones be erected and that below that no warships except ships of light tonnage in the service of river police and customs should navigate the river. It extended the life of the European Commission and increased its powers. Rumania also came to be represented on the European Commission.

The Peace Treaties (1919-1920) declared the Danube, from Ulm as well as all navigable ports of the river providing more than one State access to the sea, to be international, that is to say, open to the vessels of all nations upon a footing of equality with those of the riparian States. As envisaged by these Treaties the new Danube Statute of 1921 was established by a Convention of 1922. The Danube Statute proclaimed that the navigation on the Danube was "unrestricted and open to all flags on a footing of complete equality over the whole navigable course of the river, that is to say, between Ulm and the Black Sea." The existing European Commission was continued to exercise its jurisdiction over the 'maritime Danube' from Braila to the Black Sea. A new International Commission composed of the representatives of riparian States and of Great Britain, France and Italy was also appointed for supervising the navigation of the Danube from Braila to Ulm. The Statute laid down the procedure of amicable settlement of disputes and of appeal to the Permanent Court of International Justice. This arrangement continued up to the outbreak of the Second World War. The smooth working of the commissions was however greatly disturbed by the events of the Second World War. Russia being opposed to any international arrangement in respect of the Danube opened negotiations with Germany in 1940 for a change in the existing arrangement but no definite result came out of these negotiations. The treaties, after the close of the second world war with the Satellite powers bordering

the Danube reaffirmed the principle that "navigation on the Danube will be free and open for the national vessels of commerce and goods of all States on a footing of equality in regard to port and navigation charges and conditions of merchant shipping." The position of the European and International Commissions was however not clarified.

According to Pitt Cobbett the position in 1946 was : "The commissions have never been legally dissolved, but with Russian influence predominent along most of the course of the Danube their functions are in abeyance and the future position wholly unsettled."[1]

But in persuance of a declaration issued by Great Britain, the United States, Soviet Russia and France in December 1946 a Conference was held in July 1948 at Belgrade to lay down new regime for the Danube. A convention was adopted by the majority of States represented at the Conference but it was not accepted by the United States, Great Britain and France which maintained that the arrangement of 1921 could not be altered without the consent of all the signatories of the earlier Statute.

The Rhine.—The Rhine occupies a portion of great importance among international rivers on account of its situation and commercial utility. Since the seventeenth century States had been claiming a right of navigation over the Rhine for commercial purposes. The riparian States claimed exclusive right over it and were interested in making huge profits from the transportation of foreign commerce. This controversy became sharper on the eve of the French Revolution. After the Revoluti n it was realized by the riparian States that their interests being common would be best served by some form of common administration of the river. This idea led to the inclusion of provisions relating to navigation of the Rhine in the Treaty of Paris of 1814. This Treaty announced that the navigable portions of the Rhine to and from the sea should be free in such a way that their use should be forbidden to no one. The rules for working out the principle of freedom of navigation were left to be formulated by the Congress of Vienna (1815). The Congress of Vienna decided that the States which were traversed or separated by the river would regulate by common consent the navigation of the river and would appoint commissioners who would act on the principle that navigation of such rivers along their

1. Pitt Cobbett : Cases on International Law Vol I. p.135.

whole course from the point that they are navigable to their mouth shall be entirely free and shall not in respect to commerce be prohibited to any one subject to regulations of police. The rules framed by the Congress were of dubious import so that the riparian States could interpret them as giving them exclusive rights of navigation in the Rhine. The right to freedom of navigation could not be fully exercised by non-riparian States. Moreover, Holland claimed its rights of forbidding navigation of lower channels giving access to the sea on the ground that these channels were artificial and not part of the ri ver. Long negotiations resulted in the convention of Mayence of March 31, 1831 between the various riparian States. This convention laid down that the Rhine from the point at which it becomes navigable up to the sea including the outlets in the territory of Holland was free and open to navigation of all vessels. A central commission was also appointed to supervise navigation. In spite of all these declarations the non-riparian States could not enjoy the freedom of navi gation. Another convention of Mannheim of October 17, 1868 reaffirmed the principle of freedom of navigation of all vessels on the ground of its being a part of the European Public Law. It confirmed the establishment of the existing central commission but altered its powers. This convention, on account of certain restrictions placed as a result of certain arrangements relating to navigation could not operate in favour of non-riparian States. The Peace Treaties of 1919 confirmed the convention of Mannheim subject to the provision that vessels of all nations and their cargoes shall have the same rights and privileges as those which are granted to vessels belonging to the Rhine navigation and to their cargoes." In 1936 a convention was signed by all the States interested in the navigation of the Rhine except Holland. This convention aimed at regulating the navigation of the Rhine consistent with the principle of freedom of navigation of all vessels. But the same year Germany declared that she was not bound by the provisions of the Treaty of Versailles concerning the Commissions of the Danube, the Rhine, the Elbe and the Oder and that German waterways would be open to the ships of all nations on the footing of equality subject to the condition that German ships were allowed to enjoy reciprocal treatment.

In practice the principle of freedom of navigation of all vessels is followed with regard to the Rhine.

The Vistula.—It was by the Treaty of Tilsit (1807) concluded between France and Russia that the principle of free navigation was applied to the Vistula. The Treaties of 1815

between Russia and Austria, and Russia and Prussia declared that the navigation of all rivers in Poland would be free in the sense that they would be open to all inhabitants of the Polish provinces under the Governments of Russia or Austria and Russia or Prussia respectively. The principle of these treaties were affirmed by the Congress of Vienna. Thereafter treaty between Russia and Austria of 1818 declared that navigation of the Vistula would be free from every charge with respect to the borders belonging to the contracting parties. The same year a treaty was concluded between Russia and Prussia. This treaty declared that the navigation of the Vistula would be free from every charge except one collected in Prussia. It was replaced by a treaty between Russia and Prussia of 1825 whereby it was agreed that the navigation of Vistula and the Niemen would be free from tolls.

The Scheldt The Po.—The Treaty of Vienna of June 9, 1815 first applied the principle of free navigation to the Scheldt and the Meuse. The Treaty of London (1839) between great Britain, Austria, France, Prussia and Russia made the provisions of the General Act of the Congress of Vienna applicable to all those rivers which separated or traversed Belgium and Dutch territories. The navigation of the Scheldt was governed by this treaty whereby the Government of the Netherlands was permitted to levy a duty on vessels 'coming from the high sea' and ascending the western Scheldt in order to reach Belgium and on vessels going from Belgium descending the Scheldt in order to reach the Sea. In May 1863 a treaty was concluded between the Netherlands and Belgium. This treaty capitalized the Scheldt dues in a specified form and the Government of the Netherlands gave up for ever its right of collecting dues on the navigation of the Scheldt. A treaty concluded between Belgium on the one hand and seventeen interested States on the other, in June 1863 agreed to divide equitably the burden of the capitalized amount. In the first world war the Dutch Government prohibited the navigation of vessels of the belligerents between the lower Scheldt and its mouth.

The Congo—The Niger.—These are two very important rivers in Africa. The General Act of the Berlin Conference of February 26, 1885 applying the Vienna principle declared both the Congo and the Niger with its tributaries "free for merchant ships of all nations equally, whether carrying cargo or ballast, for the transportation of both merchandise and passengers." It also laid down the principle of perfect equality of all States would be applied so that there would be no

distinction between the subjects of riparian States and those of the non-riparian States It was also provided that no exclusive privilege of navigation would be given to any company, corporation or private individual. The signatories to the Convention agreed that the provisions contained in the Convention would be treated as forming part of International Law. The General Act further provided for the neutralization of both the rivers in time of war. An International Commission was set up with respect to the Congo for the purpose of ensuring navigation on the principle laid down in the Act.

The Convention of St. Germain of 1919 revised the earlier convention and reaffirmed the principle of complete freedom of navigation to all nations. The new and acceding members were granted the full advantage of this principle of freedom of navigation. It also provides for amicable settlement of disputes concerning the application of the Convention and also for arbitral procedure in case amicable settlement is not possible.

The Mississippi.—The Treaty of Peace between the United States and Great Britain (1783) provided that the navigation of the Mississippi from its source to the ocean should 'remain free and open to the subjects of Great Britain and to the citizens of the United States. Spain which held East and West Florida was a riparian State and did not agree to free navigation through the lower waters to the sea. After negotiations a treaty between Great Britain and Spain was concluded on October 27, 1795. This treaty declared that the river from its source to ocean would be free and open to the citizens of Spain and the United States. Another treaty known as Jay Treaty of 1794 between the United States of the Great Britain declared that the Mississippi would be open for navigation to both the States.

The Mississippi lost its international character in 1819 when Louisiana and the Florida were acquired by the United States under treaties with "France and Spain."

The Amazon—The Orinoco.—The Amazon and its tributaries flow across Brazil to the sea and is an inter-oceanic river. In 1866 by a decree of the Brazil Government the Amazon along with its tributaries was declared open to vessels of all nations as far as the frontier of the State. The Treaty of Rio de Janeiro of 1928 between Brazil and Columbia accepted the principle of reciprocity between the contracting parties and

declared that the Amazon, Yapura and Iza would be open to free navigation without payment of any charges except those agreed to between the parties.

In 1869 Venezuela by a decree opened Orinoco and its tributaries to foreign merchant ships.

St. Lawrence—It was through the Reciprocity Treaty of 1854 that the United States could secure the permission to navigate the lower waters of the St. Lawrence temporarily. By the Treaty of Washington of 1871 the St. Lawrence from the point it was navigable up to the sea was declared to be for ever open and free for purposes of commerce to the citizens of the United States subject to reasonable regulations of Great Britain or Canada. Thereafter under the Convention of 1909 concerning boundary waters between the United States and Canada navigation of all navigable boundary waters was thrown for ever open and free for purposes of commerce to the inhabitants of both the United States of America and Great Britain subject to reasonable regulations made in that behalf. The Convention also governed Lake Michigan which also became open and free for navigation of the citizens of both the nations.

7. **Law as to International Canals.**—Canals are artificial waterways and belong exclusively to the State within whose territories they are situate and no right of innocent passage exists with regard to them. But inter-oceanic canals by reason of the fact that they have a commercial utility and provide a highway for nations present international problems. Inter-oceanic Canals which may be termed as International Canals are not under any rule of customary International Law open for passage to foreign States. The right to passage through these canals is to be found in some treaty, convention or other arrangement between the interested States. All the important Inter-oceanic canals allow innocent passage to foreign States under some treaty or other agreement. The position of these canals may be noticed.

The Suez Canal.—The most important inter-oceanic canal is the Suez which connects Red Sea with the Mediterranean and which provides the shortest water route between the East and the West. The total lenegth of the Suez Canal is 101, miles. The width of 198 feet is sufficient for passage of vessels. Situated at the cross-roads of three continents—Asia Europe and Africa the Suez Canal occupies an important place in the commerce of the world. The construction of the Canal

was undertaken by Compagnie Universelle du Canal Martime de Suez under a formal concession granted by the Egyptian Government in 1856 at the request of a Frenchman, Ferdinand de Lesseps. Article XIV of the Concession laid down that "Grand Maritime Canal...........and the ports appertaining thereto shall always remain open as a neutral passage to every merchant ship crossing from one sea to another, without any distinction, exclusion or preference of persons or nationalities on payment of dues and observance of the regulations established by the Universal Company lessee for the use of the said Canal and its dependencies." This provision however had no effect of neutralization of the Canal. De Lesseps appointed a Commission of Engineers and Experts to find out whether the project was practicable and to report as to the cost of this project. The Commission reported that the project was practicable and that it would cost £ 8,000,000. The statutes of the Suez Canal Company were formulated and the capital of the Company amounting to £8000,000 was divided into 400,000 shares of 500 Francs each. The work of construction began in 1859. The Firman of the Commission was granted by the Sultan on March 19, 1866. The Canal, after construction, was formally opened for use on November 17, 1869. By the Convention of Constantinople of 1888 the Suez Canal was declared open to the merchantmen and men-of-war of all nations both in time of peace as well as of war. The Convention of Constantinople laid down that in time of war even if Turkey was belligerent no act of hostility would be allowed either inside the canal itself or within three sea miles from its ports. There were other restrictions for men-of-war during war. In 1914 Great Britain proclaimed a protectorate over Egypt. By Treaty of Lausanne of 1923 Turkey renounced all her rights over Egypt. In 1922 Egypt achieved qualified independence from British Protectorate The question of the defence of the Suez was reserved for future consideration. The Treaty of Alliance of 1936 between Great Britain and Egypt while recognising that the Suez Canal was an integral part of Egypt and essential means of communication between different parts of British Empire provided that it would be defended by British forces stationed in Egyptian territory. In 1950 Egypt under King Farouk demanded withdrawal of British Forces from the Suez. The British Government repelled this demand on the ground that the Treaty of Alliance was binding and could not be cancelled except with mutual consent. Egypt established a blockade to achieve its object. In September 1951, the matter was taken to the Security Council of the United Nations and Egypt was asked to withdraw the blockade. The Egyptian Par-

liament in October 1951 abrogated the Anglo-Egyptian Treaty of 1936 and refused to participate in the Middle East command. Great Britain supported by the United States of America reaffirmed its treaty rights and reinforced its garrison at the Suez. This attitude of the British Government led to the formation of an anti-British party in Egypt. This party committed serious riots in Cairo and the political situation in Egypt took a serious turn. In July 1952 General Neguib led an army *coup* and declared himself to be military dictator. The New Government accepted the positions that had been taken by the Farouk Government as regards the Suez Canal. General Neguib declared that the Suez Canal belonged to the Egyptian people and Egypt was capable of defending it as strongly as the British. Negotiations started between the two countries later as regards Sudan and the Suez. An Agreement about Sudan was reached on February 6, 1953 and it improved the relations a bit Thereafter discussion about the Suez canal began at Cairo in April 1953. Egypt insisted in the British evacuation of the Canal Zone while Great Britain took its stand on the 1936 Treaty. These negotiations brought no result and the situation took a serious turn. Great Britain sent warships to the Canal Zone for defence. Egypt strongly protested against this attitude. While this was happening a change in the internal affairs of Egypt took place. General Neguib resigned and Gamal Abdel Nasser became the Premier and the President of the Revolutionary Council. Nasser followed the policy of his predecessor and demanded the withdrawal of British troops. Fresh negotiations opened and ended in the agreement of July 27, 1954 wherely it was settled that the British troops will leave the Canal Zone within twenty months that the Suez base would be maintained by a British civiliaan contracting firm, that Great Britain would have a right to send troops to the Canal base in the event of an attack on Arab States or Turkey. This agreement was to remain in force for seven years. This Anglo-Egyptian ageement was formerly signed at Cairo on October 19, 1954 and ratified on December 6, 1954.

The international character of the Suez Canal remained unaffected.

Nationalization of the Canal.—In pursuance of thh Anglo-Egyptian Agreement of 1934 the withdrawal of Britisa forces from the Canal Zone was completed by the middle o June, 1956. Egyptian flags were hoisted to mark the triumph over British imperialism. After about a month the United States of America and the United Kingdom expressed their unwillingness to finance Egypt, as promised earlier, in her

Aswan Dam project. The World Bank also did not agree to help Egypt. Egypt was thus driven to desperation and President Nasser on July 26, 1956 declared his Government's decision to nationalize the Suez Canal Company in order to get income for the project of Aswan Dam. This declaration greatly alarmed the Western Powers. Great Britain lodged a strong protest and applied economic sanctions by freezing Egypt's Sterling balances and adopted measures to ruin her trade. The French Government discussed plans for an international control of the Suez while the United States sent its representatives for consultations President Nasser gave threats in these words. " We shall meet force with force and will fight to the last drop of blood. I warn the imperialist countries that any interference on their part will cause destruction of navigation in the Suez Canal." Great Britain, France and the United States called a Conference at London on August 1956 to consider the declaration of the Egyptian policy of nationalization of the Suez. Twenty-two nations were represented at the Conference. The United States suggested an international control of the Canal India supported by the Soviet Russia, Indonesia and Ceylon made the suggestion that the Canal should remain under Egyptian control subject to an International Board with advisory functions. The Conference closed with an agreements of 18 States to the effect that negotiations with a view to get the acceptance of Egypt to an international operation of the Canal be started through a committee presided by the Prime Minister of Australia Mr. Menzies, the Prime Minister of Australia went to Cairo but failed to persuade Nasser to agree to the internationalization of the Canal, Egypt asked for another Conference but this proposals was rejected by the Great Britain and France. Thereafter the matter was taken to the Security Council of the United Nations early in September 1956. The United States announced the plan of a " Suez Canal Users Association.' This plan consisted in the establishment of an Association' to be styled as 'Suez Canal Association' for the purpose of collecting tolls and managing the Canal in utter disregard of Egyptaian claims. The Soviet Government helped Egypt in supplying pilots to enable it to control the Suez. On September 17, 1956 another Conference of the eighteen States which had agreed to the proposal of the earlier conference was summoned. The same day Egypt appealed to the Security Council in the ground that British and French threats were danger to international peace and security and that plan of Suez Canal Users Association was an inroad on the Sovereignty of Egypt and a violation of the Charter and of the Convention of 1888. The Second London Confe-

rence produced on September 21, 1956 a draft plan of the Suez Canal Users Association. This Association was formally inaugurated on October 1, 1956 and an administrator was also named. The Security Council on the veto of the Soviet Russia rejected the plan for the Suez Canal Users Association. All the members of the Security Council including Egypt reached agreement on six principles on October 11, 1956. There was however no agreement about the question of the exclusive control of Egypt.

On October 29, 1956 Israeli troops approached the Suez Canal through Sinai Peninsula. The reason for this Israeli attack was declared to be that Nasser persistently declared that Egypt was at war with Israel, that he ignored his international obligations under the Charter, and violated the Constantinople Convention of 1888 in refusing to permit free passage through the Canal for the vessels of all nations at all time. On October 30, 1956 Great Britain sent an ultimatum to Tel Aviv and Cairo—demanded under threat of military action withdrawal of all troops from the Canal and consent for Anglo-Egyptian temporary occupation of Port Said, Ismailia and Suez. Egypt rejected the ultimatum with the result that British bombers began their attack on Egyptian air fields on October 31, 1956. During the war -which continued for nine days Israeli forces captured the Gaza strip and Sharmel Sheikh while the British and the French occupied Port Said. An agreement of cease-fire was arrived at on November 6, 1956 On November 7, 1956 the United Nations Assembly adopted a resolution calling on France, Great Britain and Israel to evacuate Egyptian territory. With the aid of the United Nations the Canal again opened to traffic on March 29, 1957.

On March 15, 1957 Nasser had declared that the Canal would not be open to Israeli ships. This declaration was in exercise of exclusive control which Egypt has been claiming.

In spite of this declaration in respect of Israeli ships which was provoked by the Israeli action, the position of the Suez Canal as an international waterway open to ships of all nations at all time remains wholly unaffected. The policy of nationalization even if successful would not in any way interfere with the open navigation of the Canal to all vessels.

The problems arising out of the Egyptian declaration of the policy of nationalization have not yet reached settlement.

The Kiel Canal.—Next in importance comes the Kiel Canal connecting the Baltic Sea with the North Sea. This canal lies within the territory of Germany which constructed it. Though open to vessels of all nations Germany held the control of navigation on the Kiel Canal before the first World War. The Treaty of Peace with Germany provided that "the Kiel Canal and its approaches shall be made free to the vessels of commerce and of war of all nations at peace with Germany on terms of equality." This provision of the Treaty of Peace was interpreted by the Permanent Court in the case of the Wimbledon. The British Ship, Wimbledon, chartered to a French Company was carrying munitions for the Polish Government from Salonika to Danzig Inasmuch as the Polish Government was at War with Russia, Germany refused passage through the Kiel Canal. The Permanent Court held that the Kiel Canal was open to the vessels of the States which though at peace with Germany were involved in a war in which Germany was neutral. The Treaty of Peace was denounced by Germany in 1936 without evoking any protest from the majority of signatories of that Treaty. The result was that in 1937 the German Naval Command made it obligatory for the vessels of other States to obtain permission before entering the Kiel Canal.

The Wimbledon.—This case illustrates the position of the Kiel Canal which under the provision of Article 380 of the Treaty of Versailles (1919) was declared free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality. The Wimbledon was a British vessel which had been chartered by a French Company. It was not allowed to navigate on the Kiel Canal by the German authorities on March 21, 1921 on the ground that the vessel carried military materials to Poland which was then at war with Russia and that the passage of such a vessel through the Canal would result in violation of German neutrality. The Principal Allied Powers claimed damages on the ground that Germany was guilty of breach of obligations under the treaty.

The main question was whether Germany was in the circumstances of the case justified in refusing access to and passage through the Keil Canal to the Wimbledon.

The Permanent Court of International Justice observed that the reply to the question was to be sought in the provision relating to the Canal contained in the Peace Treaty of Versailles and it proceeded to interpret the Treaty. In accordance

with Article 380 of the Peace Treaty all vessels of commerce and of war of nations at peace with Germany were entitled to inoffensive passage. It was argued that inasmuch as Great Britain was at peace with Germany the Wimbledon had a right under the treaty, to pass through the Canal and the action of Germany was wholly improper. The court held: "The Court considers that the terms of Article 380 are categorical and give rise to no doubt It follows that the Canal has ceased to be an internal and national navigable water way, the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Under its new regime the Keil Canal must be open on a footing of equality to all vessels without making any distinction between war vessels and vessels of commerce, but on one express condition namely, that these vessels must belong to nations at peace with Germany."

As to the effect of the Treaty on German Sovereignty the Court observed : "Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the powers entitled to benefit by the terms of the Treaty of Versailles to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Keil Canal."

Coming to the question whether Germany was entitled to invoke her rights and duties as a neutral power in refusing access to the Canal the Court held : "Since Article 380 of the Treaty of Versailles lays down that the Keil Canal shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany it is impossible to allege that the powers of this Article preclude, in the interests of the protection of Germany's neutrality, the transport of contraband of war...If, therefore, the Wimbledon making use of the permission granted to it by Article 380, had passed through the Keil Canal, Germany's neutrality would have remained intact and irreproachable...... From the foregoing, therefore, it appears clearly established that Germany not only did not, in consequence of her neutrality, incur the obligntion to prohibit the passage of the Wimbledon through the Keil Canal but on the contrary, was entitled to permit it. Moreover, under Article 380 of the

Treaty of Versailles it was her definite duty to allow it. She could not advance her neutrality orders against the obligations which she had accepted under this Article."

The Court gave its decision against Germany.

The Panama Canal.—The Clayton-Bulwer Treaty of 1850 which was concluded between Great Britain and the United States of America provided that the Canal when built will be protected by the contracting parties and will be open and free for all This treaty was, however, superseded by the Hay-Pauncefote Treaty of 1901 between Great Britain and the United States of America which provided for the construction and management of the Panama Canal by the United States and which gave an international status to the Canal. It was agreed that the Panama Canal was to be free, and open to the vessels of commerce and of war of all nations, it was never to be blockaded and no act of hostility was to be committed within the Canal area. The United States was granted the right to maintain such poliee force along the Canal as was necessary.

In 1903, the Hay-Varilla Treaty between the United States and the Republic of Panama led to the construction of the Panama Canal. The Republic of Panama granted to the United States land for the construction of a canal from Colon to Panama with right to protect and manage the canal after it had been built. This treaty further provided that the canal when built shall enjoy perpetual neutrality and shall be open to vessels of all nations. The Panama Canal was opened in 1914 and the United States is responsible for its protection and management. It is open to the vessels of commerce and of war of all nations under the rules framed in that behalf.

8. International lakes and land-locked and in land seas.—Lake and land-locked seas which are surrounded by more than one State and which are also navigable from the open sea are international in character. Such lakes and land-locked seas, though international in character, are within the exclusive territorial jurisdiction of the two or more States which surrounded them. As regards freedom of navigation the practice of the States seems to lay down that such lakes and land-locked seas as are surrounded by more States than one and navigable from the sea are not only open to the vessels of the States bordering its shores but are open to the commerce of other nations also.

Hyde States the rule thus :

> " Where a lake forms a part of the territorial water of two or more States, a common right of navigation is enjoyed by several proprietors. Thus, Lakes Ontario, Eric, Huron and Superior and their water communications, are treated as 'international waters being dedicated in perpetuity to the common navigation of all the inhabitants' of the countries on both sides of the boundary. Such a right of navigation is not enjoyed by States other than those to which the waters may said to belong."

The practice of States guided by treaty, agreement or otherwise, as evidenced from the present position of these lakes and land-locked or inland seas, seems to be that States other than States bordering these waters enjoy freedom of navigation. The lakes lying in the Congo district are under treaty open to the vessels of all nations. The position of important inland seas will bear out this practice.

The Baltic Sea.—Though connected with the open sea through a narrow strait the Baltic sea is now regarded a part of the open sea. During the eighteenth century littoral States claimed right to forbid hostilities within it and to neutralize it without the consent of the belligerent. Such a right stood negatived by the conventions which existed with regard to the character of the Baltic Sea. The Treaty of Copenhagen of 1857 affirms the position that the Baltic Sea is open to vessels of all nations in war as well as in peace and that it has the same character as the open sea of which it is virtually a part.

There exists no control of the littoral States over the Baltic and it has ceased to be an inland sea but is international in character.

The Black Sea.—The Black Sea formerly constituted a part of the territories of the Ottoman Empire. Its territorial character underwent a change when Rumania, Bulgaria and Russia acquired lands bordering on it and when Bosphorus and Dardenelles which connect it with the open sea opened to vessels of foreign States. In 1774 it was declared open to merchant vessels of foreign States but not to vessels of war. By the Treaty of Paris 1856 the Black Sea was neutralised and was declared open to merchant ships of all nations but closed to warships excepting those which were required for policing the area In 1871 the Treaty of London was concluded and it allowed Russia to maintain its warships on the sea and establish naval arsenals on its coast. This Treaty however did not open the straits of Bosphorus and Dardenelles

to warships. Turkey was however given the right to allow warships in time of peace if it was under an obligation to do so by reason of some prior treaty or agreement.

The Treaty of Lausanne (1923) established an International Commission to supervise the sea and the straits. In 1936 Convention of Montreux was arrived at and it settled the position. The Black Sea along with its straits was declared fully open to all merchant vessels except those belonging to State at war with Turkey both in peace as well as in war. Special regulations were made for war vessels in peace as also in war.

The freedom of navigation of the Black Sea is enjoyed by all nations both in peace as well as in war.

International Straits.—The expression 'international straits' may conveniently be used for straits wider than those which can be commanded by guns from coast batteries or straits which though territorial in the sense that they are bounded on both sides by the territory of the same State or bounded on one side by the territory of one State and on the other by that of some other State or States constitute a natural passage between two parts of the open sea. Straits wider than those which can be commanded by coast batteries can be claimed by the State in whose territory they lie. Thus Great Britain hardly claims exclusive right in respect of the St. George Channel, the Bristol Channel, the Irish Sea, and the North Channel. Straits which, though territorial in character connect two portions of the open sea are open to passage of ships of all nations. The rule therefore is that straits which are wider than those which can be commanded by guns from coast batteries or those though form part of the territory of one State or that of two or more States connect two parts of open sea are free and open to innocent passage of vessels of all nations.

Hyde states "A Strait which serves as a passage from one open sea to another ought not on principle to be closed. This is believed to be true although the waterway is the part of the domain of the States adjacent to it. It is the relation which the channel of communication bears to navigation generally as a means of access to the seas thus connected which, rather than any other circumstance, is decisive of the equities of foreign maritime States."

Treaties and Conventions are also prominent in regulating the passage through Straits. Form time immemorial Denmark had not been allowing passage to foreign vessels through the

two Belts and the Sound—a narrow Strait which divides Denmark form Sweden and connects Kateegat with the Baltic without payment of tolls known as Sound dues. On the protest of the United States these dues were abolished in 1857 and the Straits became freely open to all foreign vessels. The Strait of Magellan furnishes another instance where the exclusive right of the State yielded to the recognised principle of freedom of innocent passage. In 1879 the United States of America strongly protested against the attitude of Chile and the Argentine Republic with respect of the Straits of Magellan on the ground that no nation could lay exclusive claim to the Straits. In 1881 Chile and the Argentine Republic made a declaration that the vessels of all nations had a right of innocent passage through the straits. The Boundary Treaty of Buenos Ayres of September 15, 1881 between Chile and Argentina provides that "Magellan's Straits are neutralised for ever, and free navigation is guaranteed to the flags of all nations."

Bosphorus and Dardenelles.—These are two important territorial straits connecting the Black Sea with the Mediterranean. The Black Sea was formerly enclosed by the Turkish territory. When in the eighteenth century Turkey ceased to own all the territory around the Black Sea and Bulgaria Rumania and Russia acquired parts of the territories bordering the Black Sea, the Straits of the Bosphorus and the Dardenelles remained within the territorial limits of Turkey. Since these straits connected the Black Sea with the Mediterranean Turkey allowed the right of passage to foreign merchant vessels. By the Treaty of the Dardenelles of 1809 between Great Britain and Turkey the ancient rule of the Ottoman Empire was recognised and it was agreed that foreign ships of war would alone be excluded and the straits would be open to merchant ships of all nations.

The Treaty of London of 1841 as well as the Treaty of 1856 while reaffirming the principle of the earlier Treaty reserved the right of the Sultan of Turkey to permit passage of light vessels of war employed in the service of foreign legations. The Treaty of 1871 conceded a further right to the Sultan to open in time of peace the straits to vessels of war of friendly States if he considered it necessary to implement the terms of the Treaty of 1856.

Turkey however could not remain steadfast and more than once yielded to the request of Russia to let her torpedo boats and war vessels pass disguised through the straits. In 1900 Russian torpedo-boats under a false merchant flag were

allowed passage. Again, in 1904 war-ships disguised as merchant vessels were permitted to pass the straits. Neutral States made strong protests and Turkey had to close temporarily the Straits to Russian merchant vessels during war with Italy. The Straits Convention of 1923 proclaimed the "principle of freedom of transit and of navigation of Sea and air" through the straits. Along the shores of these straits 'demilitarized zones' were created, and it was agreed that no military fortifications were to be maintained within these Zones. An International Commission was appointed at Constantinople to supervise the navigation of the straits and submit reports to the League of Nations.

In 1936 was signed the Montreux Convention which abolished the International Commission and entrusted the control of the Straits to Turkey. The Convention reaffirmed the principle of freedom of the transit and navigation through the Straits. Turkey was given the right to militarise the Straits. Detailed rules in respect of navigation and allied matters were formulated by the Convention. The Turkish Government was given wide powers of regulating the passage consistent with the principle of freedom recognised by the Straits Convention of 1923. The need for revision of this Convention was felt at the Potsdam Conference of 1945 but so far there has been no agreement.

The Corfu Channel Case.—A number of events occurring in the Corfu Channel in Albanian territorial waters gave rise to this case. On May 15, 1946 Albanian coastal batteries fired upon British warships passing through the Corfu Channel. On October, 1946 two British warships were struck with mines while innocently passing through the Channel. The warships sustained damage and many crews lost their lives. On Novemver 12-13, 1946 the British Royal Navy, without the permission of Albania swept for mines in the straits within the territory of Albania in pursuance of a decision of the International Mine Sweeping Commission. Albania protested against what it called 'premeditated violation of its sovereignty. Diplomatic correspondence brought no result and the matter was referred to the Security Council which by a majority vote held on March 25, 1947 that Albania had knowledge of the presence of mines. The Russian veto rendered this decision wholly ineffective. Thereafter on the proposal of Great Britain the case was referred to the International Court of Justice.

The case of the United Kingdom was that (i) ships of war on both the occasions were exercising their right of innocent

passage through the Channel that (2) the fire by coastal batteries at her warships on the first occasion was in violation of International Law, that (3) Albania had herself laid the mines or in the alternative the mine-field was laid with her connivance and that having knowledge of the presence of the mine-field Albania did not give a warning to the British warships of impending danger and thus violated international obligations based on well recognised elementary considerations of humanity even more exacting in peace than in war that, (4) the British warships were sent through the Straits not only to carry out a passage for purposes of navigation but also to test Albania's attitude and that (5) her mine sweeping operations were in pursuance of agreement of November 22, 1945 authorising mine clearing operation and were also designed to secure the *corpora delicti* that is to say to secure the instrument of crime (the mines).

The Albanian Government pleaded that (1) she did not lay mine-field and also had no knowlege of mine-field and therefore had no duty to give any warning to the warships, that (2) the British warships on the first occasion were fired by coastal batteries for the reason that foreign merchant vessels or warships had no rights to pass through Albanian territorial waters without prior notification and permission of Albanian authorities, that (3) Corfu Channel was not an international waterway through which a right of passage existed and that (4) the British Royal Navy by sweeping the mines committed violation of her sovereignty.

The Court of International Justice finding no evidence to establish the alleged fact that Albania herself laid the mines held against the United Kingdom that it was not proved that the mines were laid by Albania. It however held that laying of mine-field in that part of the Channel which constituted her territorial waters was within the knowledge of Albania. Its finding was. "From all the facts, and observations mentioned above the Court draws the conclusion that the laying of the mine-field which caused the explosions on October 22, 1946 could not have been accomplished without the knowledge of the Albanian Government."

Coming to the duty of Albania to notify the presence of the mines, the Court observed: "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague

Convention of 1907, No. VIII which is applicable in time of war, but on certain general and well recognised principles namely elementary considerations of humanity even more exacting in peace than in war, the principle of the freedom of maritime communication ; and every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States.'' It held that Albanian authorities did nothing to prevent the disaster and these grave omissions involved the international responsibility of Albania. The Court reached the conclusion that Albania was responsible for the explosions which occurred on October 22, 1946 and consequently for the damage and loss of human life which resulted from them.

The Court, in laying down the test to be applied in considering whether the Corfu Channel was an international highway, observed thus : "But in the opinion of the Court the decisive criterion is rather its geographical position as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between the two parts of the high seas, but only an alternative passage between the Aregean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic..........................

Having regard to these considerations, the Court has arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international high ways through which passage cannot be prohibited by a coastal State in time of peace."

The Court therefore, came to the conclusion that the United Kingdom did not violate Albanian sovereignty by sending warships through the strait without prior permission of the Albanian Government.

On the question as to the innocence of the passage of the British warships the Court held that in view of all the circumstances the passage of the warships was innocent and the mere fact that the United Kingdom admittedly sent warships to test Albania's attitude was no ground for holding that the passage was a violation of Albania's sovereignty.

The plea of the United Kingdom that her mine sweeping operations of November 12-13, 1946 were justified on the ground that they were for securing the possession of mines was rejected by the Court which observed : "According to that Government, the *corpora delicti* must be secured as quickly as possible, for fear they should be taken away, without leaving

traces, by the authors of the mine laying or by the Albanian authorities. This justification............was presented first as a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State in order to submit it to an International Tribunal and thus facilitate its task. The Court cannot accept such a type of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past. given rise to most serious abuses, and such as cannot, whatever the present defects in international organization, find a place in International Law."

The Court by a majority held Albania responsible for the losses that the United Kingdom suffered on account of the two incidents of March and October, 1946. It also held that the United Kingdom violated Albanian Sovereignty by carrying out mine-sweeping operations in Albanian territorial Waters.

CHAPTER XIV

INTERNATIONAL TORTS AND RESPONSIBILITY OF STATES

Resposibility of States.—States as International Persons have duties to perform with respect to other States and their citizens These are international duties and neglect of international duties constitutes an international delinquency. The responsibility of the States arises out of duties imposed upon them by International Law. This responsibility is either original or vicarious.

Original and Vicarious Responsibility.—The State has responsibility not only for the actions of its Government but also for acts done by its agents. The responsibility of the State for the actions of its Government and its agents is original responsibility. The responsibility of the States for certain unauthorised actions of its agents or their subjects is known as vicarious responsibility. This vicarious responsibility is imposed upon a State by International Law. The original responsibility is more serious than the vicarious responsibility for the former arises out of acts done by itself while latter is imposed upon it for certain internationally

the entrance of the aliens into its territory. While International Law recognises the inherent right of every sovereign nation to forbid the entrance of foreigners within its dominions or to admit them only on such terms and upon such conditions as it may see fit to prescribe, a modern State finds it difficult except on rare occasions to exercise its right of *total exclusion* of foreigners. This inherent right of exclusion however does not entitle a State to make discriminations so as to allow entrance to the subjects of one foreign State and to forbid the nationals of another foreign State from entering its territory. The same rule applies to exclusion of aliens from the territory of a State.

Once an alien is allowed entrance into the territory of a State, he is entitled to protection of his life and property. But while a State is responsible for the protection of life and property of an alien present within its territory, it is free to concede to him such rights as it may deem fit to confer. Most modern States concede to aliens almost the same civil privileges as are enjoyed by their own nationals. These privileges include the right to hold, inherit and transfer real property, the right to contract, the right to carry on trade or engage in professions, the right of religious worship and the right of freedom of speech. Ordinarily, an alien is not entitled to a better treatment than that accorded to the citizen. An alien is entitled to enjoy all those rights which the laws of the State allow him and the State is responsible to protect these rights of his in the same manner as it protects similar rights of its citizens. This responsibility of the State is based on the doctrine of "equality of treatment."

Some writers maintain that if a State has provided for the same procedure for the protection of the rights granted to an alien under municipal law as for the protection of the rights of its citizens, it has discharged its responsibility and the foreign State of which the alien is a citizen has no right to complain. There are other writers who affirm that there exists an International "standard of justice" and if a State does not maintain the minimum standard of international justice with the result that an alien fails to get such protection as is expected of a civilized State, the State renders itself answerable to the foreign State of which the alien is a subject This theory of international "standard of justice" is not only advocated by eminent jurists of Great Britain, the United States and other countries but is supported by decisions of international tribunals.

The international 'standard of justice' requires maximum of independence of the judiciary and total absence of any control of the Government over it. If the courts are not independent but are controlled by the executive organ of the State, it is futile to seek redress from them. The Courts of a civilized State are presumed to do justice and if proceedings before them result in denial of justice, they fall below the standard required by International Law.

The acts of the State are judged by international standards of justice. The Claims Commission in the case of *Neer Claim* (1926 between the United States and Mexico laid down the test by which State acts are to be judged. It stated: "without attempting to announce a precise formula, it is in the opinion of the Commission possible......to hold that the propriety of governmental acts should be put to the test of international standards, and that the treatment of an alien in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of his country do not empower the authorities to measure up to international standards is immaterial."

There are numerous ways in which the responsibility of a State arises and we may now discuss the various spheres of State responsibility.

(*a*) **State responsibility with regard to the acts of individuals.**—If an individual causes a civil injury to an alien by his wrongful act, the injured alien has a right to claim redress of that wrong in all those ways as are provided by law of the land where he is present. The alien is bound by the final decision of the courts of that State inasmuch the same way as a citizen is.

It is of utmost importance that the alien victim is to exhaust the local remedies in respect of the wrong done to him The Permanent Court of International Justice in the case of the *Panevežys Saldutiskis Railway* (1939) has laid down that a claim for compensation for an international delinquency or tort cannot lie unless the remedies provided by the national law of the delinquent State have been exhausted.

There are however exceptions to the rule of exhaustion of local remedies. It is not necessary to have resort to local remedy when the Municipal Courts of the delinquent State cannot award compensation or damages. The *Permanent* Court of International Justice in the case of the *Panevezys-Saldutiskis Railway* (1939) observed : "There can be no need to resort to the Municipal Courts if these Courts have no jurisdiction to afford relief; nor it is necessary again to resort to those Courts if the result must be a repetition of a decision already given." This case lays down two exceptions, namely (*a*) that if the Municipal Courts of the respondent State have no jurisdiction to grant the relief of damages or compensation, it is not necessary to approach these Courts for the redress of the wrong done, (*b*) that if the Municipal Court of the respondent State has already given an adverse decision, it is not necessary to go to higher Courts of that State when it is clear that the result will be the same.

Another exception to the rule is that a victim of the wrong need not approach the local Courts which are powerless to do justice. The Courts will not do justice when they are not independent; for example when they are under the control of the executive organ of the State which is responsible for his wrong or when the wrong proceeds from the legislative organ. A third exception is that a foreign citizen is not required to exhaust local remedies when the injury was caused by an executive act of the Government itself. It is however no excuse for not exhausting local remedies that the proceedings in the local Courts will take a long time or that they will end in denial of justice. The Claims Commission in the case of the *Mexican Union Railway Ltd.* (1930) between Great Britain and Mexico observed that "there can be no question of denial of justice or delay of justice, as long as justice has not been appealed to." The fact that it was not necessary to follow the rule of exhaustion of local remedies has to be proved by the State which claims to come within the exceptions. The compliance of the rule cannot be dispensed with by an agreement between the States, as held by the Arbitral Tribunal in the case of *Salun* (1931) between Egypt and the United States of America.

But if the final decision of the Municipal Courts is so perverse, arbitrary or discriminatory as to amount to denial of justice, the State of which the alien is a subject may take up the matter diplomatically to be decided on principles of International Law.

If the alien becomes a victim of the criminal act of an individual the State is responsible to afford redress. The State must with due diligence arrest and prosecute the offender. If it neglects to arrest and prosecute the offender it renders itself liable to compensation The *Galvan* case[1] and and the *Janes* case[2] are authorities for the proposition that the failure on the part of a State to take prompt action in apprehending the offender of the alien amounts to negligence giving rise to the responsibility of the State for compensation for the wrong done by the individual. Criminal acts of minor officials in excess of their authority resulting in injury to an alien call for greater degree of promptness on the part of the State and a slight negligence in arresting the accused and prosecuting him would be enough to fasten liability on the State for compensation.

A State is not in all circumstances liable for the wrong done to a foreigner by its own national. Its responsibility arises only when it lacks a machinery whereby such wrongs can be prevented or when it is unable to prosecute the culprit and punish him. The Claims Commission in the case of *Noyes Claim* (1933) between Panama and the United States of America stated the Law thus: "The mere fact that an alien has suffered at the hands of private persons an aggression, which could have been averted by the presence of a sufficient police force on the spot, does not make a government liable for damages under International Law. There must be shown special circumstances from which the responsibility of the authorities arises; either their behaviour in connection with the particular occurrence or a general failure to comply with their duty to maintain order to prevent crimes or prosecute and punish criminals."

(*b*) **State responsibility for mob violence**—A State has to exercise due diligence in preventing the occurrence of riots. If the State has failed to exercise due diligence in preventing violence of the mob and an alien is injured the State is responsible. Whether or not due deligence was exercised by a State is to be judged on the facts and circumstances of a particular case.

(*c*) **State responsibility for acts of insurgents—Calvo Doctrine.**—The responsibility arising out of a mob violence to aliens is different from that which results from acts of

1. Mexico v. United States: Fenwick Cases 223.
2. Opinion of the Commissioners (1927) p. 108.

insurgents. The State responsibility with regard to acts of insurgents does not depend upon the lack of due diligence as in the case of responsibility for mob violence, because the existence of an organised rebellion raises a presumption of due diligence on the part of a State in suppressing it This presumption is stronger when the State recognises the insurgents as belligerent power. In this connection a reference may be made to what is known as *Calvo doctrine* which lays down that a State is not responsible for losses suffered by aliens at the hands of its insurgents. The doctrine in such an absolute form has however not been accepted by a number of States including the United States and Great Britain. The attitude of these States is that a State is not responsible for losses suffered by aliens at the hands of its insurgents unless there has either been negligence on the part of the State in suppressing the insurrection or lack of due diligence in preventing the particular acts which caused the loss to the aliens. The insurgents trying to overthrow the established Government are not the representatives of the State and their actions can not be considered to be those of the State. It is on this principle that International Law does not hold the State responsible for the wrong done to foreigners by the insurgents. The British-American Claims Arbitral Tribunal in the case of the *Home Missionary Society* (1920) held that "it is a well-established principle of International Law that no Government can he held responsible for the acts of the rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection." This rule applies only to revolutions or to a state of insurgency and not violence. In order that a state of insurgency may be held to exist it is necessary that there must be according to the Mixed Claims Commission in the case of *George Pinson* (1928), an "armed and more or less organised movement which, inspired by a social or political programme, under the influence of one or several determined personalities or springing solely from general discontent, aims at the overthrow of a particular Government or at a fundamental change in the system of government."

It must be noted that, if the insurgents become successful in overthrowing the established Government and in establishing their own effective Government, the government so established is responsible for all wrongs done to foreigners doing the insurgency *Schwarzenberger* states the rule thus: "Exactly the same reasons, as a rule, exclude the liability of

a Government for the acts of unsuccessful revolutionaries work in the opposite direction in the case of successful revolutions. The acts of revolutionaries who have established effective *de facto* or *de jure* Governments are those of actual State organs, such responsibility dating back to the initial stages of the revolution or civil war."[1]

In the course of a war between two States the aliens have no right to complain of the losses which they might have suffered in common with nationals either at the hands of the enemy or the State within the jurisdiction of which they happen to be present. The legitimate acts of a State even though they may cause injury to the aliens being done in exercise of a right of self-preservation cannot be questioned at all and the State cannot be made responsible for what the enemy has done on its territory.

(*d*) **Responsibility of a State for the acts of its governmental organs** —The State is directly responsible for the acts of its Head or its highest executive officers on the administrative side, if those acts cause injury to the alien With regard to the acts of the subordinate executive officers the State is responsible only when the act complained of was done by the subordinate executive officer within the general scope of his authority. This responsibility arises when remedies provided by law have been exhausted and the State fails to punish the subordinate official, if required to be punished under thoes circumstances by the law in that behalf. If the subordinate official by their acts not done within the scope of their authority injure an alien they render themselves personally liable.

The State is responsible for the acts of commission and omission of its executive organs. Even a *bona fide* mistake on the part of its administrative officers is not enough to absolve the State of its responsibility to the foreign State. The Claims Arbitral Tribunal in the cases of the *Jessie,* the *Thomas F. Bayard* and the *Pesca-wha* (1921) held : "Any Government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands." An act of omission on the part of executive officials of the State will render the State liable to the foreign Government. In the case of *Laura M. B. James* (1926) between Mexico and the United States the State of Mexico was held guilty for failure of its ex-

1. Schwarzenberger : International Law Vol. I p. 226.

ecutive authorities to take prompt action to arrest and punish the murderer of an American citizen.

A State is responsible for its legislative acts. Acts of legislature of a State which are likely to injure the rights of the aliens may form the subject of protest by foreign States. Also legislations which discriminate against aliens and which aims at putting an end to the fundamental rights of aliens constitute a violation of International Law and the State which brings into force such laws is directly responsible to the foreign States.

The defect in the machinery or its laws cannot be pleaded as defence in matters where the State is responsible for international tort committed by its Legislative Organ. A State is bound to respect the rules of International Law and to perform the obligation imposed upon it under those rules. It is obligatory for the State to see that none of its organ comnit an International tort. In the case of the United States of America versus Guatemala (1930) it was held : "it is settled principle of International Law that a Sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subject "

(c) Responsibility for the acts of the Judiciary.—The acts of judicial organs of a State also fasten responsibility on a State under International Law. The State is responsible only when the decision of its courts is manifestly unjust. If there is denial of justice by the courts to aliens, the State has to bear the burden of responsibility What amounts to denial of justice may not be always easy to find and it has been generally accepted that a judgment which no court acting judicially will make would evoke protest of a foreign State. In modern constitutional governments the judiciary holds a position uncontrolled by the executive and although a State is unable to influence in any way the judgment of its courts, or to take action against its judges, it is liable to make good the loss occasioned to the alien by a manifestly unjust judgment of its courts.

The expression 'denial of justice' in this connection carries a definite meaning An erroneous judgment of a court of law cannot amount to denial of justice, as was held in the case of *Salem* (1932). This expression has reference only to the action of the judiciary and may not be used in a broad sense, so as to refer to acts of the Government itself or its officials. The Claims Commission in its opinion in the case of *Chattin Claim* (1927) dealt at some length with the question as to

the true implications of the expression 'denial of justice.' It observed that it would be confusing to use the term 'denial of justice' with reference to the acts of executive and legislative authorities as well as to the acts of the judicial authorities for it said "there would exist no international wrong which would not be covered by the phrase 'denial of justice' and the expression would lose its value as a technical distinction." The Commission confined the use of this expression only to the acts of the judiciary. According to it acts of judiciary resulting in denial of justice must be such as may amount to an outrage, bad faith, wilful neglect of duty or insufficiency of action apparent to any unbiased man. The expression 'denial of justice' was held to refer to the act of the judiciary itself and to "be in the fact that the courts themselves did injustice." According to Arbitrator Pound there must be 'an injustice antecedent to the denial, and then the denial after it.' This was a case relating to damages brought by the American Government for the illegal arrest, trial and sentence and of inhuman treatment in jail of an American national, Chattin in Mexico. The Claims Commission held that there was denial of justice for it observed: "Irregularity of court proceedings is proven with reference to the absence of proper investigation, the insufficiency confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open Court a mere formality, and a continued absence of seriousness on the part of the Court." In the case of Salem (1932) the expression 'denial of justice' was explained thus: Absolute denial of justice;inexcusable delay of proceedings; obvious discrimination of foreigners against natives; palpable and malicious inequity of a judgment—these are the cases which, one after another, have been included under the notion of 'denial of justice'. The General Claims Commission in the case of *Garcia* and *Garza* (1926) between United States of America and Mexico laid down the rule for finding out whether there was denial of justice. It observed: "In order to assume such a denial there should be convincing evidence that, put to the test of international standards, the disapproval of the sentence of the court—martial by the President acting in his judicial capacity amounted to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency."

(*e*) **State responsibility with regard to contractual relations of aliens.**—The practice of States Shows that there is no general responsibility of a State for breach of contracts which aliens entered into with its government and the foreign States of which aliens happen to be the nationals are reluctant to press the claims of their subjects to the States guilty of breach of contract. The aliens aggrieved by the breach of contract are free to have their remedy which the laws of the State have provided in that behalf.

Calvo Clause : –The Americans at the end of nineteenth century brought into vogue the insertion of a clause in contracts entered into by aliens with foreign States. This is known as *Calvo Clause* which provided that aliens would submit their disputes arising out of the contracts to the municipal courts of the State to be decided according to municipal laws and that disputes arising out of contracts would not form the subject of diplomatic representations. The authorities are however not unanimous on the question whether the insertion of Calvo Clause in a agreement precludes the alien from appealing to his home Government for taking diplomatic action against the State guilty of breach of contract. Some regard the Calvo Clause to be a bar to any displomatic intervention, others maintain that it does not operate as a bar.

It appears that such clauses cannot fetter the discretion of the home Government to intervene. Firstly, a State has a right under the International Law to do all that is possible to safeguard the interest of its subject and this right cannot be taken away by insertion of a Calvo Clause in an agreement to which it is not a party. Secondly, the right of a State to press diplomatically the claim of its subject who as alien suffered losses by reason of breach of contract and who failed to get proper redress by manifestly unjust decision of the municipal courts cannot be taken away by the Calvo Clause.

Standard of a liability of States.—A State acting in violation of rules of International Law is guilty of an international tort. Its responsibility lies in the acts of commission or omission with regard to its international obligations. As stated earlier a *bonafide* mistake cannot be set up as a ground of excuse for a wrong committed by the State officials. '*Mens rea*' or culpability cannot furnish a standard by which the responsibility of a State is to be judged. Although international courts and tribunals have not always acted on

the principle that the responsibility of States is judged not on the culpability or the *mens sea* but on the wrongful act itself, they have in majority of cases favoured the view that it rests on the acts of commission or omission judged by international standards and that a subjective test was inapplicable. It is the objective test that is to be applied in judging the propriety or otherwise of the governmental acts. The Franco-Mexican Mixed Claims Commission in the case of *Jean-Baptists Craire* (1929) observed : "In examining these questions in the light of the general principle I have indicated, I find that these principles must be interpreted in accordance with the doctrine of the 'responsibilite objective of the State, that is to say, a responsibility for those acts committed by its officials or its organs and which they are bound to perform despite the absence of faults on their part ... .The State also bears an international responsibility for all acts committed by its officials or its organs which are delectual according to International Law, regardless of whether the official or organ has acted within the limits of his competence or has exceeded these limits" This case lays down the principle that it is not the culpability that provides the test for judging the liability of a State but it is the delict as judged from international standards that matters. The Commission in the same case also laid down the rule that in order to justify the admission of this responsibilite objective of the State for acts committed by its organs outside their competency "it is necessary that they should have acted atleast apparently as authorised officials or organs or that, in acting they should use powers or measures appropriate to their official character."

The responsibility of a State is thus judged by international standard. Those standards have been set forth by the Claims Commission in its opinion in the case of the *Neer Claims* (1926) where it was laid down that governmental acts are to be put to the test of international standards so that they may not amount to an outrage, to bad faith ; or to wilful neglect of duty. The governmental steps in relation to a foreigner may also not appear to be insufficient or short of international standards to a reasonable and impartial man. The State is not absolved of its responsibility by reason of the fact that there was deficient execution of an intelligent law or that its laws donot empower the authorities to measure upto international standards. The Claims Commission in the case of *H. Roberts* (1926) rejected the plea that the foreigner was given the same treatment as was given to the national and observed : "Such equality is not the ultimate test of the

prporiety of the acts of the authorities in the light of international law.The testis,broadly speaking whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhuman imprisonment."

A State is responsible for the acts of its organs or officials within their competence. If the acts of organs and officials even though outside their competence are such as may be imputed to the State, International Law will hold the State responsible. The *Youman's* case (1926) in an authority for the proposition that the State is responsible for the wrongful acts of its soldiers who acted beyond the scope of their authority. But the State will not be responsible if it is proved beyond doubt that the acts of its officials were without any authority, for such an act cannot be held to have been done on behalf of the State. The sub-committee of the Committee of Experts for the Progressive Codification of International Law under the League of Nations observed in its Report : ,'If the act of the official is accomplished outside the scope of his competence that is to say, if he has exceeded his powers, we are then confronted with an act which, judicially speaking is not an act of the State. It may be illegal but from the point of view of International Law, the offence cannot be imputed to the State." In such cases also the State will be held responsible if it does not take proper steps to punish the official or to prevent the recurrence of the offence. The official guilty of the offence must be dealt with properly, for if the State does not punish him it would be deemed to have approved of the illegal act rendering itself liable.

A State cannot be permitted to plead that there was a *bonafide* mistake, or that the acts complained of were not committed wilfully, maliciously or with culpable negligence. The British American Claims Arbitral Tribunal in the case of the *Jessie* (1921) rejected the plea of *bonafide* error and observed : "Any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands." Malice or culpable negligence are not necessary to be proved in a claim against a State for its international delinquency.

It is however permissible for a State to take the plea of self-defence or it may show that the act was due to force majeure.

Limitation for the action against State.—International Law has not so far prescribed any limitation for an action against a State in respect of its international delinquency. The Permanent Court of Arbitration in the *Pious Fund* case (1902) between Mexico and the United States of America has rejected the idea of introducing the rule of limitation in international matters for it observed: "The rules of prescription, belonging exclusively to the domain of Civil Law cannot be applied to the present dispute between the two States in litigation." The *Bulgarian Greek Mixed Arbitral Tribunal* in *Sarropoulos* v. *Bulgaria* (1927) though in favour of introduction of the rule of limitation in the international system observed: "Positive International Law has not yet established any precise and generally accepted rule either regarding the principle or the duration of the period of prescription." In the interest of peace and security in international sphere it is really desirable that State actions may be decided without undue delay.

Remedies—A State guilty of an international delinquency is liable to make reparations for the wrong. The wronged State is permitted by International Law to claim reparations through diplomatic negotiations. It is also entitled, in case of the failure of diplomatic negotiations, to raise an action claiming compensation for the wrong done before a tribunal appointed by agreement with the delinquent State. An international tort, just as a tort in private law, gives rise to a liability of the delinquent State to compensate the wronged State for the injury caused. The remedy by way of an action for compensation or damages is available to the wronged State both for the purpose of upholding the dignity of law and also of exacting and receiving a pecuniary penalty. It is not necessary in such actions to prove material injury or loss in order to get compensation. The breach of international obligations is enough to entitle the wronged State to a compensation. If the violation of International Law has resulted in material injury or loss, the amount of compensation is liable to be assessed at the pecuniary value of the loss or injury caused.

In cases where the wrongful act or an international tort is committed in relation to a private citizen of a foreign State, the damages suffered by the foreign State are not identical with those suffered by its national. But it is convenient to assess the damages due to the State on the basis of the pecuniary value of the loss or injury suffered by the individual. The Permanent Court of International Justice in the case of the *Chorzow Factory* (1928) observed: "The damage suffered by an indivi-

dual is never ....identical in kind with that which will be suffered by the State; it can only afford a convenient scale for the calculation of the reparation due to the State." The award of compensation is permitted on the principle that the person injured may receive the pecuniary value of the injury. The law does not allow vindictive or exemplary damages. The Permanent Court of Arbitration in the *Norwegian Claims* case (1922) held that "no State can exercise towards the citizens of another civilized State the 'power of eminent domain' without respecting the property of such foreign citizens or without paying first compensation as determined by an impartial Tribunal." The Court defined just compensation as implying a complete restitution of the *status quo ante*, based upon the pecuniary value of loss caused by the international delinquency. The Permanent Court of International Justice in the *Chorzow Factory* case (1928) stated the principle of compensation thus: "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to International law." The same principle was reaffirmed by the Mixed Claims Commission in the Lusitania Cases (1923) where it was observed: "The legal concept of damages is judicially ascertained compensation for wrong. The compensation must be adequate and balance as near as may be the injury suffered." The Commission refused to allow exemplary, vindictive or punitive damages and laid down the rule thus: "That injured one is, under the rules of International Law, entitled to be compensated for an injury inflicted resulting in neutral suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should commensurate to the injury. Such damages are very real and the mere fact that they are difficult to measure or estimate by money standards makes them nonetheless real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty."

International Law, unlike the private law, does not maintain a distinction between direct and indirect damages but permits the award of such damages as are considered to be natural and normal consequences of the tortious act. The Mixed Claims Commission between Germany and the United States of America in the *War Risk Insurance Premium Claims* (1923) observed : "The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in International Law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term "remote". In the case of the *Naulilaa Incident* (1928) the Special Arbitral Tribunal allowed all damages which were the normal and natural consequence of the German aggression and disallowed remote damages. It observed : "It would not be just to limit Germany's responsibility strictly to the damages which has been caused by the German forces themselves, and by them alone, and there is room to allow Portugal under the head of reparation for damage, an indemnity which is arrived at by the Arbitration equitably, taking note of all the circumstances, without any need to enter into the details of any of the claims".

International Law permits the award of damages both for mental and physical suffering undergone by an individual. As stated above, in the *Lusitania case* (1923) the Commission observed that mental suffering was as real as physical suffering and it would amount to denial of justice if damages for mental as well as physical suffering were not allowed. Again, in the case of *Agnes Connelly* (1926) the General Claims Commission allowed damages to the brothers and sisters of the American national killed by a man in Mexico on account of grief and indignity suffered by them. The damages for mental suffering and for indignity are permissible to be awarded even though no material loss or injury is proved as held by the same Commission in the case of *Stephens* (1927).

The International Courts and Tribunals are competent to allow interest as part of the compensation in a proper case. The Permanent Court of Arbitration in the *Norwegian Claims* case (1922) held that it had power to allow interest in proper cases *ex-cequcet bcno.* There is however no rule prescribing the time from which interest is to be awarded. In some case interest is directed to accrue from the date of the decision while in other cases the tribunals award interest from the date of the international tort. In the *Shufeldt* case (1930) the Mixed

Claims Commission awarded interest from the date of the illegal act, while in *George Pinson* case interest accrued from the date of the award.

CHAPTER XV

JURISDICTION OVER ALIENS

State supremacy and aliens.—A State is supreme within its territory and it has a right to forbid entrance of aliens into its territory. 'It is an accepted maxim of International Law that every sovereign nation has the power as inherent in sovereignty, and essential to self-preservation to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[1] In practice however this right cannot possibly be exercised in all its implications. No State can in modern times afford to remain in isolation The growth of international trade with its rapid means of communication and transport and the growing demand of social and cultural intercourse makes it necessary for the States to permit foreigners' access into their territories. Moreover, according to *Oppenheim* "intercourse is a characteristic of the position of the States within the family of Nations and therefore a presupposition of the international personality of every State." It would thus appear that no State can now afford to exclude aliens altogether. Presence of aliens on the State territories is now a normal phenomena and although a right of total exclusion of aliens exists it is not and cannot be exercised in practice.

Though total exclusion is not practicable, a State can impose conditions under which aliens may be received within its territory. But the conditions that a State may impose should apply to the citizens of all States and should not be discriminatory against a particular State.

In the exercise of its territorial supremacy a State has a right to receive an alien who after committing a crime or

1. Nishimura Ekiu v. United States 142 U.S. 651.

after having been prosecuted comes to its territory. The State unless it is bound under some extradition treaty is not obliged to refuse protection to a fugitive alien coming to its territory. It may however be noted that the fugitive has absolutely no right to demand shelter of the State into the territory of which he has escaped. There is no right by which an alien fugitive may claim an asylum in the territory of a State.

Admission of aliens.—A State in exercise of its supremacy has a right to refuse to admit aliens on its territories. It has also a right to admit them on certain conditions. This right is now seldom exercised and the practice of States is to allow admission to aliens in their territories either with or without imposing conditions. A State cannot however make invidious distinctions between nationals of one foreign country and those of the other. It would be regarded as an unfriendly act, if a State admits nationals of one foreign country and refuses to admit those of another foreign country. International Law does not cast a duty an a State to admit aliens and not to exercise its discretion in admitting them. A State admitting aliens may impose such terms and conditions as may be consistent with its national interest. In the case of *Volpe* v. *Smith* the United States Supreme Court laid down the rule that the "power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question." The well recognised rule is that a State may forbid entrance of aliens into its territories, but in view of the growing interdependence of States with easy and quick means of communication a modern State is inclined to admit aliens into its territories with or without imposing certain conditions. The conditions that are generally imposed are for the purpose of safeguarding national interests.

In times of war a State is entitled to impose stricter conditions on the entrance of aliens into its territories. *Hyde*, observes : "A State engaged in war or otherwise confronted with what it conceives to be a national emergency may find that the public safety requires that restrictions and prohibitions, in addition to those normally provided, be imposed upon the departure of persons from, and their entry into, its domain. Aliens may find themselves subjected to special restrictions. The Congress of the United States has at times made enactments applicable to them. Moreover, in so doing, it has

announced special reasons for the withholding of immigration visas, passport visas and kindered documents."[1]

Expulsion of aliens.—A State in the exercise of its territorial supremacy has a right to expel aliens who are staying on its territory either temporarily or permanently. This right is to be exercised in the same manner as right to exclude aliens A State should not act in an arbitrary manner in expelling aliens. It should also not show discrimination against the citizen of a particular State Whether or not expulsion of an alien is well founded and justifiable can be determined on the facts and circumstances of a particular case. There must be some just cause for expelling an alien. In cases where the aliens are arbitrarily expelled, their home State in exercise of its personal supremacy is entitled to enquire into the causes, which led to expulsion and to insist on readmission of the expelled individual into the territory from which he was expelled in case the act of expulsion was either arbitrary or discriminatory. According to *Fenwick* the right of a State to expel aliens from its territories for reasons bearing upon the public welfare of State is well established but in exercise of that right a State must make no discrimination against the citizens of a particular foreign State as such.[2] In 1920 United States. expelled a number of Russian Socialists and anarchists on the ground that their presence in United States was detrimental to the welfare of the country.

Oppenheim makes a distinction between expulsion in peace time and expulsion during war and states the law thus :—

"Theory and practice correctly make a distinction between expulsion in time of war and in time of peace. A belligerent may consider it convenient to expel all enemy subjects residing or temporarily staying within its territory. And although such a measure may be very hard and cruel the opinion is general that such expulsion is justifiable. As regards expulsion in time of peace on the other hand the opinion of writers, as well as the practice of States naturally differ much."[3]

Justification for Expulsion.—A State having admitted aliens into its territories can expel them on proper grounds.

1. Hyde : International Law Vol. I p. 229-230.
2. Fenwick—International Law (Third Edition) p. 269.
3. Oppenheim—International Law Vol. I p. 632.

Expulsion of aliens must not be arbitrary and must be based on reasonable grounds. The act of expulsion must be *bonafide*. A State has a right to expel aliens when it *bonafide* believes that presence of aliens on its territories will affect its national interests adversely. "Expulsion may savour of an abuse of power if the decision to expel be not founded on a *bonafide* belief as to the evil effects upon the State of the continued presence of the individual within its domain. A conclusion in favour of expulsion need not necessarily coincide with one to which the State of which the alien is a national would, under like circumstances, assent. On the other hand, a decision to expel must not be one which no State could in good faith be reasonably expected to reach. Thus arbitrary action, either in the choice of the individual expelled or in the method of expulsion, would indicate an abuse of power and point to internationally illegal action."[1]

It is a settled principle of International Law that a State cannot unjustly and harshly expel an alien from its domain. An unjustified and harsh expulsion may result in a demand by the State of which the expelled alien is the national for reparations. A State which expels an alien must justify its action and should be prepared to disclose the reasons of expulsion to the State concerned. The reasons for expulsion must be such as may appear reasonable There should be no arbitrariness with regard to expulsion, for an unjustified expulsion has far-reaching consequences. International Law does not prescribe particular reasons for expulsion but it leaves it to States to decide itself the question whether there exist conditions calling for expulsion of aliens. "Thus in practice, an aggrieved State enjoys a wide latitude. It may expel from its territory one who commits acts that are forbidden by its law, or who may be fairly regarded as a prospective violator of them, or who proclaims his opposition to them, regardless of the view of his conduct or anticipated conduct that is entertained by his own State." Expulsion has been ordered on various grounds. Aliens have been expelled for (*a*) spreading socialistic propaganda, (*b*) promoting and organising a strike, (*c*) carrying on medical profession without the requisite licence, (*d*) subversive activities (*e*) writing or speaking derogatory to the Government of the country and other undesirable activities. An act detrimental to the national interests of a State on the part of an alien furnishes a ground for his expulsion. Apart from such causes an alien is liable to be expelled if he did not comply

1. Hyde : International Law Vol. . P. 230.

with the conditions subject to which he was allowed admission. The fact of war provides a good cause for expelling aliens who are nationals of the enemy.

An important consideration in cases of expulsion is the manner in which the alien is expelled. Even if the grounds for expulsion are wholly justifiable, the expulsion would be improper in case there is harsh treatment of the alien in the process of expulsion. The procedure adopted for expelling an alien should be such as may not work out a hardship for the alien The Claims Commission in the case of *Daniel Dillon* (1929) between the United States and Mexico observed : "There may be no rule of International Law or practice with regard to precise, proper methods of expelling an alien such as those that have been suggested by writers, by conducting a man to an international border, or by delivering him to a representative of his Government. But when resort is had to a use of unnecessary force or other improper treatment there may be ground for a charge such as is made in the instant case, account being taken of the manner in which expulsion might have been affected." An alien who has been residing for a long time in the territory of a State and is carrying on business cannot be expelled without giving him a reasonable notice to enable him to make necessary arrangements. In expelling him nothing should be done as may injure him mentally, bodily or economically. A decent expulsion is desirable and the expelling State has a duty to see that the alien is not injured in any manner.

Status of aliens—The position of aliens is that while they submit themselves to the territorial supremacy of the State in the territory of which they are either residing or staying temporarily, they continue to remain subject to the personal supremacy of the State of their nationality. What follows from this position is that the aliens are under an obligation to respect the laws of the land and that they are entitled to protection of their person and property. We have already seen the responsibility of the State with regard to aliens ; we have now to find out what status the aliens possess.

Each State has a right to grant such privileges to aliens as it may consider proper The aliens are not entitled to any favoured status. Most modern States allow their aliens the same civil rights as distinguished from political rights as are enjoyed by their own citizens. In majority of States they enjoy the right to hold and dispose of property, right to

contract, right to carry on trade, and professions, right of religious worship and of freedom of speech.

Having submitted to the jurisdiction of the State the aliens are liable to obey the law, to pay taxes and to refrain from doing any act injurious to the State or its citizens. Permanent aliens are also liable in time of necessity to join the police force of the State or to perform some other public duties. But the aliens can on no account be required to join the army or the navy.

As a matter of fact the aliens owe a restricted form of allegiance to the State in the territory of which they reside. They are responsible to that State for all acts committed by them on its territory. An alien is not entitled to, by reason of his being subject to the personal supremacy of his home State to do any overt act to help the home State during war between the home State and the State in the territory of which he is residing. Such an act if committed amounts to high treason for which the alien is punishable.[1]

The case of *De Jager* vs. *Attorney General of Natal* illustrates the principle of responsibility of a resident alien. In this case it was held that a resident alien within British territory owes allegiance to the Crown and if he assists invaders during the absence of State forces and on the occupation of the territory by the enemy forces he is guilty of high treason.[2]

A recent case is that of *William Joyce* decided by the House of Lords in 1945. William Joyce was an American national but resided in England between 1921 and 1939. In 1939 he applied for a passport describing himself as a British subject born in Ireland. During the second world war he joined the German radio service. After the defeat of Germany he was taken prisoner and was tried for high treason. The defence of Joyce was that he was not a British subject. The House of Lords held that although he was not in law a British subject he by his own act in describing himself to be a British subject bound himself in allegiance to the Crown. He was held guilty and sentenced to death.[3]

Each State has under the International Law a duty to protect the person and property of the alien and to grant him

1. Carlisle v. United States 16 Wallace 147.
2. De Jager v. Attorney General of Natal (1907) A. C. 326.
3. Joyce v. Director of Public Prosecutions (1946) 62 T. L. R. 208.

equality before the law with its citizens. *Oppenheim* points out the various duties of the State with regard to aliens :—

"An alien must in particular not be wronged in person or property by the officials and courts of a State. Thus the police must not arrest him without just cause ; custom-house officials must treat him similarly, courts of justice must treat him justly and in accordance with law. Corrupt administration of the law against natives is no excuse for the same against aliens and no Government can cloak itself with the judgment of corrupt judges."[1]

The principle of equality before the law does not mean that the aliens are to enjoy all the privileges of the citizens of the State but means that law would protect the rights of the aliens in exactly the same way as it protects the similar rights of the citizens. According to *Kelsen* this protection must conform to a minimum standard of civilization. The fact that the legal status granted to citizens is below this minimum standard is no excuse.[2]

An alien is free to leave the territory of the State where he is residing and the State of his residence has no right to prevent him from doing so but it can insist on payment of taxes, fines, private debts and other dues.

CHAPTER XVI

ACQUISITION AND LOSS OF TERRITORY

Modes of acquisition of State territory.—The modes recognised by International Law by which an existing State can acquire territory are :—

Occupation.—*Oppenheim* defines occupation as an 'act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State.'[3] The territory

1. Oppenheim—International Law Vol. I. p. 628.
2. Hans Kelsen—Principles of International Law p. 243.
3. Oppenheim—International Law Vol. I. p. 507.

to be occupied must be *res nullius* in the sense that it is either uninhabited or occupied by an uncivilized people or by a tribal organization which cannot be called a State. People occupying a territory but not forming themselves into a State as known to International Law can have no rights of occupancy and cannot resist the occupation of their territory by a State.

The title of a State to a territory not belonging to any other State is valid only when its occupation of that territory is effective and not merely fictitious. In order that an occupation may be effective it is necessary that a State must take possession of a territory and establish its administration over it. The possession of a territory implies that the occupying State has taken the territory under its sway with the intention of exercising supremacy over it. Ordinarily, the occupying State proclaims its occupation over the territory and makes a settlement thereon and thus brings the territory into its possession.

The next step towards effective occupation is to establish administration over the territory. The territory sought to be appropriated must be governed by the State occupying it. The Government must be established over the territory. The Permanent Court of International Justice in the case of the *Legal Status of Eastern Greenland* stated the law thus :—

"A claim to sovereignty based on not upon some particular act or title such as a treaty of cession, but merely upon continued display of authority, involves two elements each of which must be shown to exist : the intention and will to act as sovereign and some actual exercise or display of such authority."[1]

Only so much of the territory as is brought into effective occupation becomes the property of the occupying State. In practice States claim right to an area wider than that effectively occupied by them. Such a claim cannot be supported by any rule of International Law and must be rejected. The area effectively occupied passes to the occupying State. Whether or not a certain area of a territory was in effective occupation must be determined on the facts of each case.

It is not always necessary that the acts of appropriation or annexation as they are sometimes called must precede the acts

1. (1931) P. C I. J. Series A/B No. 53.

of settlement or establishment of effective control over the territory in question. This order may sometimes be reversed, so that the acts of appropriation may follow the other essential acts of completing the title. Thus, the British colony of Natal was annexed many years after the sea port of Durban was formed by the British settlers in 1824. Neither the act of appropriation nor of settlement or establishment of effective control alone is enough to confer a legal title. In the *Clipperton Island* Arbitration between France and Mexico (1931) where France based her claim on her effective possession of the Island, it was observed: "It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual and not the nominal taking of possession is a necessary condition of occupation. This taking of possession consists in the act or series of acts, by which the occupying State reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking and in ordinary cases, that only takes place when the State establishes in the territory itself an organization capable of making its laws respected." An effective possession over some territory results in display of sovereignty, the symbol of statehood The Permanent Court of Arbitration in the *Palmas* case 1928) dealt with the question of territorial sovereignty of State over an area of land claimed by means of occupation. It excluded a negative idea of territorial sovereignty and emphasised the positive side of it, for it observed: "Territorial sovereignty as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty; the obligation to protect within the territory the rights of other States in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its national in foreign territory...... .. Territorial sovereignty cannot limit itself to its negative side *i.e.* to excludding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which International Law is the guardian."

The Declaration of the Institute of International Law (1888) announced that acquisition of territory by occupation could not be recognised as complete unless there was possession over the territory enclosed within certain limits and also an official notification of taking possession. The Declaration made it clear that the taking of possession was accomplished by the

establishment of a responsible local power sufficient to maintain peace and order on the territory.

Discovery not the basis of title.—During the sixteenth and seventeenth century when there were many discoveries, title by discovery was used to be pleaded. But in the eighteenth century it was recognised that mere discovery could not be the basis of any valid title to the territory discovered. Discovery accompanied with actual possession can only perfect the title.

Discovery alone does not give a title but there is no doubt that it strengthens title claimed on the basis of occupation. The Permanent Court of Arbitration in the Palmas case (1928) observed: "If on the other hand the view is taken that discovery does not constitute a definite title of sovereignty but only an 'inchoate' title, such a title exists it is true, without external manifestation. However according to the view that has prevailed at any rate since the nineteenth century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered." In sixteenth and seventeenth centuries when a number of discoveries of lands were made fantastic claims of title unknown based on mere discovery were common. Both temporal and spiritual monarchs laid their claims on the discovered lands as there were no legal principles in international sphere to meet the situation. Mere discovery was taken to be sufficient to create a complete and good title. Thus Spain put forward its claim to the whole coast of America northward from the Gulf of Mexico on the ground that it was discovered by Spanish sailors. The English also claimed that part of the territory on the ground of discovery of Cape Breton or Newfoundland by John Cabot in 1497 and the exploration of the shore by Sebastian in 1498. Another claim was made by France on the ground of discovery of North Carolina in 1524 by a Florentine in the service of the French King The Bulls of 1493 and 1494 by which Pope Alexander VI aimed at partition of the New World between Spain and Portugal stand out as historical instances of the claims on the ground of discovery. The English Queen denied the claim of Spain, when she said that she did not "acknowledge the Spaniards to have any title by donation of the Bishop of Rome." These and similar claims awaited settlement and the writers on International Law had to turn to the law of the Romans for solution. Then followed the slow process of evolution of these rules which decide these claims. The concept of occupation as it is understood at the present time came to find an abiding place in International Law.

Theories as to the extent of occupied territory.—The acquisition of territory by means of occupation is accomplished by a formal act of appropriation followed by an act of settlement and establishment of effective control by the occupying State over the area in question. As already stated, territories not belonging to any State can be acquired by occupation. According to *J. B. Moore* 'title by occupation is gained by the discovery, use and settlement of territory not occupied by a civilized power.' In cases of acquisition of title by occupation the question as to the extent of the occupied territory frequently arises. Such controversies assumed great importance in connection with the claims over the polar region where it was not possible by reason of climatic conditions to attain an effective control over the occupied area. The difficulties of acquisition of title over polar areas were many, and were due to the natural conditions of the locality. The severity of climate in those areas made it impossible for occupying States to obtain or retain effective control over them. The principles governing the title by occupation with regard to non-polar areas were hardly applicable to polar areas. Writers on International Law confronted with this situation advanced theories of continuity and contiguity to explain the phenomena of occupation in polar regions.

Theory of Continuity.—The theory of continuity aims at bringing under the sovereignty of the occupying State that area of territory over which it has no effective occupation but which is necessary for the security and development of the effectively occupied territory. According to this theory the boundaries of the occupied territories extend not only to that area which is under effective occupation but also to an area without which the area under effective occupation cannot either be developed or governed safely. This theory in effect means that an act of effective occupation over an area is sufficient to extend the sovereignty of the occupying State as far as is necessary for the safety and development of the area of effective occupation. This theory was advanced on the constant practice of States which while effectively occupying a number of isolated areas asserted their rights of sovereignty over intervening areas that connected those in effective occupation. This assertion on the part of the States generally followed shortly after the occupation and was considered effective to prevent other States from laying their claim over such areas. *Hyde* observes: "It was felt that the sovereign on whose behalf settlement had been effected at a particular spot might be supposed within a reasonable

time to seek to extend his dominion over the surrounding country because such an extension was either necessary for his own safety or incidental to the natural development of his domain. The application of such a theory was, however, beset with difficulties, partly because of lack of agreement concerning the period of time within which a State might properly claim an exclusive right to extend and assert its control over the surrounding country as well as of areas that were remote therefrom "[1] America put forward the theory of continuity in support of her claim to the unoccupied territory in the Oregan dispute of 1844. The United States of America claimed territories on the ground of her prior discovery and settlement. Great Britain denied this claim and disagreed on the principle of continuity. The rule of International Law that occupation extended as far as it was effective prevailed and the American plea could not prevail. The Treaty of 1846 brought settlement of the dispute.

Theory of Contiguity. -Similar to the theory of continuity is that of contiguity. The theory of contiguity is rather supplementary to the theory of continuity and aims at extending sovereignty of an occupying State to neighbouring territories on geographical basis. States have laid claims to islands relating close to their mainland on the ground of proximity; they have also claimed unoccupied territories lying close to their territories on the same ground. This theory is opposed to the well established rule of effective occupation and cannot be supported on principle. *Hyde* observes: "On principle, unoccupied islands in the open sea and beyond territorial waters of a State, are not, by reason of their relative proximity to its shores to be deemed a part of its domain. Such was the contention of the United States in 1852 with respect to the Loboo islands off the coast of Peru."[2] In the *Palmas* Arbitration case (1928) the Permanent Court of Arbitration considered the principle of contiguity as the basis of title and rejected it as not being supported by rules of International Law for it observed: "Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive International Law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma*—nearest continent

1. Hyde: International Law Vol. I p. 333.
2. Hyde: International Law Vol. I p. 343.

or island of considerable size...........The principle of contiguity in regard to islands may not be out of place when it is a question of allotting them to one State rather than another either by agreement between the parties or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results."

The principle of abandonment.—Title acquired by occupation is liable to be lost on the ground of abandonment or relinquishment. If effective occupation has been establish, abandonment or withdrawal of sovereignty temporarily will not result in the loss of title. The abandonment, in order to work out extinguishment of title of the occupying State should be definite and for such length of time as may lead to an inference that the occupying State has intention to resume control of the territory or to lay in future any claim to it. There have been a number of cases of loss of territory by abandonment. Great Britain lost her title to the island of Santa Lucia in the Caribbean when after the massacre of the British residents of the island in 1640 no attempt was made to resume control or occupation of the island. The island was occupied by the French in 1650 as an unoccupied territory. The case of the Trinity Island furnishes a good example of abandonment. The Trinity Island was discovered by the Portuguese who did not effectively occupy it. Great Britain occupied it for some time but later on abandoned it with the result that Brazil came into effective occupation. In 1895 Great Britain attempted to reoccupy it. Brazil protested on the ground that Great Britain lost title by abandonment. In 1896 Great Britain renounced all her claims to the island and acknowledged the sovereignty of Brazil.

Abandonment "depends on the intention of reliquishing or on the cessation of physical power over the thing, and must not be confounded with simple neglect or desertion." In case abandonment is to be proved evidence of definite intention of giving up the right of property and control of the territory should be forthcoming. The intention to abandon need not

be express but may be gathered from the circumstances attending withdrawal of authority from a territory. Hyde observes : "Abandonment as a process of law is not however believed to be wholly dependent upon the design of the State acknowledged to have been the territorial sovereign of a particular area. Its action or inaction must have been such as to convince the impartial mind that that sovereign is not in a position to deny that it has given up its rights Nevertheless, the conditions that would compel such a conclusion must depend upon the circumstances of the particular case, and must be expected to be influenced by the geographical relationship of the territory concerned to that of the alleged abandoner, and also by the existence or non-existence of its power at all times to assert unmolested supremacy within the area concerned." [1]

Accretion.—Title by accretion has been imported from the Roman Law. The increase in land of a State territory enures for the benefit of the State which owns the territory. *Oppenheim* defines accretion as 'increase of land through new formations.' An island coming out of a river is an accretion to the territory of the State which owns the river. Accretion may be either natural or artificial. If the increase of land is the result of human efforts, the accretion is artificial. If, on the other hand, it is through natural formations the accretion is natural Embankment, dykes and break waters which require human efforts for their formation are artificial accretions while new born islands are natural accretions.

According to *Hyde* the term 'accretion' as a mode of acquiring newly made lands was not derived from the Roman law, as it is not found either in the institutes or in the works of classic commentators. The term 'accretio' of the Roman Law did not at all convey the idea of what is now understood to be implied by the term 'accretion ' The word 'alluvio' in the Roman Law meant the process by which land was imperceptibly formed by action of water. The early writers on International Law borrowed the term 'alluvio' for application to the disputes relating to newly formed lands but this too was inadequate to meet the broader problems that were involved in such disputes. In the case of the *County of St. Clair* v. *Livingston* it was observed : "In the light of the authorities alluvian may be defined as an addition to riparian land, gradually and im-

1. Hyde : International Law Vol. I p. 394.

perceptibly made by the water to which the land is contiguous. It is different from reliction and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same." The acquisition of title by accretion relates both to new lands formed by natural causes and to those which are the result of men's efforts. Also, the fact that the formation of the land has been sudden and perceptible is immaterial. "A State's territory may be increased or decreased by processes of accretion or erosion respectively. Accretion may result not only in addition to the main land but also in the formation of deltas, islands, and bars within the maritime belt of the littoral State Such accretion can generally be brought about only by erosion from other lands. The process, therefore, by which territory is gained by one State may, though not necessarily, involve the loss of territory by another State."

Alluvions are frequent causes of accretions as through alluvion the land territory of a State considerably increases. Deltas are formed at the mouth of a river by gradual deposit of sand, earth and stones and they lead to the enlargement of the territory of a State on land. New islands are formed on rivers and maritime belts by natural processes and add to the territory of a State. The question of accretion by the birth of a new island arose in the case of the *Anna* relating to the capture of a Spanish vessel by a British privateer.[2] The United States claimed that the vessel was captured within the American maritime belt. Lord *Stowell* upheld this claim on the ground that the vessel was captured beyond three miles of the continental coast but within three miles of some mud island which were formed within the American maritime belt The mud islands were held to be accretions extending the territory of the United States. This case also shows that the maritime belt was measured from the mud island and not from the coast.

Subjugation.—Subjugation as a mode of acquisition of a territory is the result of a war. Some writers call conquest as the mode of acquisition of a territory. ***Oppenheim***

1. Hackworth : Degest I p 409.
2. 5 C. Rob 373.

is of the opinion that conquest alone is not enough to validate the title to sovereignty over enemy territory. According to him conquest ef enemy territory coupled with formal annexation gives a valid title to the conqueror. Mere possession by the conqueror of the enemy territory is nothing because it is not until annexation takes place that the rights of vanquished State over that territory cease to exist. "Annexation turns conquest into subjugation. It is the very annexation which *uno actu* makes the vanquished State cease to exist, and brings the territory under the conqueror's sovereignty."[1]

On subjugation taking place the conqueror acquires a good title to the territory and the enemy subjects residing on the subjugated territory become the nationals of the conquering State.

A conquest by itself in all cases does not result in establishment of sovereignty over the conquered lands. If the conquered territory is inhabited by people who are not civilized and backward, the conqueror may occupy the territory and establish its sovereignty, ignoring the title of the inhabitants. If the conquered territory was itself a State exercising sovereignty, the conquest by military force will not result in establishment of sovereignty of the conqueror. The acquisition of title in such a case will be complete in a transfer of sovereignty under an appropriate treaty. In the case of the *United States* v. *Hayward* Justice *Story* observed that the establishment of sovereignty of a conqueror "could only be by a renunciation in a treaty of peace or by possession so long and permanent, as should afford conclusive proof that the territory was altogether abandoned by its sovereign or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British Sovereign." Again Chief Justice *Marshal* in the *American Insurance Company* v. *Canter* declared : "The usage of the world is, if a native be not entirely subdued to consider the holding of conquest territory as a mere military occupation, until its fate shall be determined at the treaty of peace." According. to *Hyde* subjugation takes place when the conqueror finally annexes occupied yet hostile territory to its own domain, thereby announcing its design to acquire rights of sovereignty over the conquered area. He States that subjugation "be taken not only the acquisition of rights of sovereignty by virtue of sheer power, but also

1. Oppenheim—International Law Vol. I (Seventh Edition) p. 319.

unconcern on the part of the conqueror as to the lack of any any agreement manifesting acceptance of the change by its foe."[1] He defines subjugation as "a mode by which an existing right of exclusive control is taken away from one State (possibly by its very extinction) and lodged in another."

Subjugation under the United Nations.—Title by subjugation presupposes the legality of warfare. Before the General Treaty for the Renunciation of War, the right to make war was inherent in a State and the title to the territory by subjugation as a result of war was regarded legal. The Charter of the United Nations affirms the principle which pervades the General Treaty for the Renunciation of War. The position at present is that war is not lawful. It follows that acquisitions made through war cannot also be lawful. States which are bound by the Charter and the General Treaty for the Renunciation of War cannot lawfully acquire territory by subjugation.

Prescription.—The concept of prescription has also been borrowed from private law. *Oppenheim* describes prescription 'as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.'[2] Acquisition of title by prescription is based on long possession and user. The concept of prescription in International Law promotes stability in international affairs. International Law does not prescribe any definite period of time after the expiry of which title by prescription matures. As to what length of time is necessary for acquisition of title by prescription depends on the circumstances of each case. Long possession and user over a territory acquiesced in by other States is enough to complete title by prescription The Privy Council in *The Direct United States Cable Co.* v. *The Anglo American Telegraph Co.* held that Great Britain acquired title by prescription over Conception Bay in Newfoundland by its long prossession and exercise of dominion coupled with the acquiescence of other States. The Treaty of 1897 by which the boundary dispute between Great Britain and Venezuela prescribed a period of fifty years for acquisition of title by prescription.

It is not only lapse of a number of years but the circums-

1. Hyde—International Law Vol I p. 358.
2. Oppenheim—International Law Vol· I (Seventh Edition) p. 527.

tances of the case that determine the question whether title by prescription has perfected.

Oppenheim states the law thus:

"There are indeed immeasurable and imponderable circumstances and influences at work besides the mere lapse of time to create the conviction that in the interest of stability of order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences which are of a political and historical character, differ so much in the different cases that the length necessary for prescription must likewise differ."[1]

In the case of *Indiana* v. *Kentucky*[2] it was observed : "It is a principle of public law universally recognised that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nations' title and rightful authority." The acquisition of title by prescription is recognizable only if there has been such uninterrupted and undisturbed possession as may imply acquiescence on the part of the dispossessed power in the sovereignty of the occupant.

International Law does not lay down any period of time for acquisition of title by means of prescription. There is no usage or accepted rule laying down the length of time necessary for international prescription. According to *Grotius* it was necessary for acquisition of title by prescription that the possession should be for a period beyond memory. *Hyde* is of opinion that "possibly at the present day a possession will within the memory of living men might suffice."

Cession.—The concept of transfer of property as employed in private law is also present in International Law in the form of Cession which is a recognized mode of acquisition of property. When a State which is the owner of a territory transfers it to another State it cedes the territory and the State to which it is ceded gets title by cession. *Oppenheim* defines cession as 'the transfer of sovereignty over State territory by the owner-State to another State'

Cession takes place by agreement and ordinarily the territory is ceded under the terms of a treaty. Cession may be necessitated by the terms of a treaty of peace on the conclusion

1. Oppenheim—International Law Vol. I p. 528.
2. 136 U. S. 479 (510).

of a war. The territory may be ceded on recovery of compensation. The owner State can cede the territory without compensation or by way of gift. Austria ceded Venice to France by way of gift in 1866.

The sovereignty of the acquiring State over the ceded territory is not established merely by the treaty of cession. The ceded territory is to be occupied by the acquiring State. "The treaty of cession must be followed by actual tradition of the territory to the new owner-State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such war in the military occupation of the State to which it is now ceded."[1]

No third State has power to veto a cession of a territory unless its rights have been by such cession infringed.

Cession is a derivative mode of acquiring territory while occupation is an original mode. The difference between cession and occupation lies in the fact that sovereignty is derived from the owner-State in the case of cession while it is intentionally acquired by the occupying State itself in occupation.

Plebiscite and Principle of Self—Determination— There is no rule of International Law which requires plebiscite to validate a cession of territory But it is claimed by some writers that inasmuch as the sovereignty of the new owner is forced upon the inhabitants of the ceded territory, it is but proper that a plebiscite be held for the purpose of taking the consent of the inhabitants in favour of the cession of the territory where they live. This claim cannot however be supported except on the ground of necessities of international policy The Treaties of peace concluded after the First World War adopted the method of plebiscite in a number of cases. The French Constitution of 1946 provided for plebiscite in case any new territory was added to France.

"The consent of the population of ceded territory is not essential to the validity of cession, although *Grotius* (bk II. Ch VI sec. 4) is believed by some to have held the opposite view. It is worthy of note however that in recent years cession of territory have frequently been conditioned upon the will of the people as expressed in a plebiscite."[2] There is nothing in

1. **Oppenheim—International Law Vol. I (Seventh Edition) p. 502.**
2. **Hackworth: Digest I. P. 422.**

International Law which requires a plebiscite to validate cession but it is necessary in the interests of international peace and security that plebiscite should confirm cession. The practice of States upto the seventeenth century little cared for the wishes of the inhabitants of the ceded territory for it was not legally considered necessary to hold a plebiscite for validating an act of cession. Some of the famous treaties before the first world war which arranged for cession of territories ignored the wishes of the people. The Congress of Vienna of 1815, the Treaty of Frankport of 1871 and the Treaty of Berlin of 1878 whereby territories were handed over to alien rulers did not take into account the wishes of the inhabitants of the ceded territories. The second half of the nineteenth century however saw the evolution of the principle of self-determination in matters of transfer of territory. A number of writers advanced the theory that the transfer of territory should depend upon the wishes of the people. *Vattel* held the view that a nation had no right to barter away its members' allegiance and liberty for some advantages in return. The American Declaration of Independence affirmed the right of the people to determine their own form of Government. The French Revolution brought in the idea that the transfer of sovereignty should depend upon the consent of the people. Plebiscite came into practice in 1848 when Lombordy Venetia and other Italian Duchies annexed their territories to Sardinia. In 1860 plebiscite was taken in respect of other Italian provinces. In 863 the cession by Great Britain to Greece of the Ionian islands was made to depend on the vote of approval of the Legislative Assembly of the islands elected for the purpose. The Treaty of 1867 between the United States and Denmark provided for plebiscite in respect of cession of Danish West Indies. Theses treaties which expressed respect for national aspirations of the people were insufficient to curb the tide of growing nationalism in Europe. The pre-1914 Europe saw great dissatisfaction in many a quarter on account of foreign rule over unwilling people. A large Italian-speaking population was groaning under the foreign Austrian rule. Alsace-Lorrain was dissatisfied with the German rule. Transylvania was being governed by Hungary against its wishes. These and many other parts of Europe became important areas of unrest on the eve of the First World War.

Hyde observes : "Between the years 1914 and 1920 statesmen became increasingly aware of the disturbing effect upon the general peace which was likely to ensue if a victorious belligerent were permitted to suffer no restraint in enforcing

the transfer to itself of hostile territories. The nature and extent of the equities of the inhabitants were perceived, and the value of respect for them as a means of preserving tranquility was acknowledged."[1]

During the First World War demand for national self-determination and independence became very prominent This demand was fully recognised by President Wilson who in his address to the Congress in January 1918 while enunciating his fourteen points in respect of international peace and security emphasised the need of taking into consideration the wishes of the inhabitants of territories in cases of transfer of sovereignty. Again in February of the same year he declared:"Peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattel and pawns in the game. Peoples may now be dominated and governed only by their consent. Self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril." At the Paris Peace Conference of 1919 the demands of self-determination were given effect to in many an arrangement. The principle of self-determination was applied and the populations were given an opportunity to express their wishes through plebiscite in cases where such a cause was advantageous to the victors It failed to appeal in those cases where it conflicted with the territorial ambitions of the victors. The Treaties of 1919 provided for as many as nine referenda and the principle of self-determination came to stay in international matters as a convenient rule in cases of conflict between national aspirations and the territorial ambitions of the victor.

Lease of State territory.—A State is entitled to lease its territory to another State for a term of years. Lease of State territory may only entitle the lessee State to enjoy the usufruct of the territory leased but may not entitle it to exercise sovereignty over it. In such cases in the eye of law the sovereignty of the lessor State remains intact. The lessee State is not entitled to do anything which may be detrimental to the interests of the lessor State.

Leases of State territory are of a recent origin and materially differ from leases of the private law. "Apart from the element of coercion in their negotiation it would seem that the sovereignty of the lessor State over the territory was more nominal than real".[2]

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1. Hyde: International Law Vol. I p. 364.
2. Fenwick—: International Law (Third Edition) p. 368

As a matter of fact the terms of the treaty determine the authority to be exercised by the lessee over the territory leased. There is no uniform rule as to what passes to the lessee on the completion of the lease. More often the exercise of sovereignty and not the sovereignty itself is ceded by means of a lease. Leases of this type were those made by China in 1898 She leased Kiaochow to Germany, Wei-Hai-Wei and the land opposite the island of Hong-Kong to Great Britain, Kuang-Chou Wan to France and and Port Arthur to Russia. Sometimes leases grant certain jurisdictional rights and do not involve transfer of sovereignty or the exercise of sovereignty over the leased territory. Of this type were the leases which Great Britain made in 1941 in respect of small pieces of territory to the United States for the use of operation of naval air bases in Newfoundland, Burmuda, Jamaica St. Lucia, Antigua, Trinidad and British Guiana for ninetynine years.

Pledge of State territory.—A State is also entitled to take a loan on the security of its territory or part of it. History evidences numerous cases of pledges of State territories. In 1768 the then Republic of Genoa pledged Corsica to France. Sweden pledged Wismar in 1803 to Mecklenburg on condition that she would be entitled to take back Wismar after hundred years on repayment of the loan with interest at 5 per cent per annum.

Loss of State territory.—According to *Oppenheim* loss of State territory occurs in six ways, *viz*, cession, operations of nature, subjugation, prescription, revolt and dereliction.

Cession.—We have noticed that territory is acquired by cession. The acquisition of property by one State is the loss to the other. The acquiring State gains the territory which the ceding State loses.

Operations of nature.—Accretion is a mode of acquiring property and corresponding to this mode is the mode of losing territory by operations of nature. Disappearance of land by natural actions results in loss of territory to a State. Volcanic action may cause an island to disappear and thus lead to loss of territory to a State.

Subjugation and prescription.—A State by subjugation and prescription acquires the territory belonging to the other State. It is thus obvious that in this way one State gains what the other State loses. These are therefore the two modes of losing territory.

Revolt.—History records innumerable cases in which revolts caused loss of territory to States. As a result of a revolt Netherlands broke off from Spain in 1579, Belgium from Netherlands in 1830. United States of America from Great Britain in 1776 and Brazil from Portugal in 1822.

Dereliction.—This mode corresponds to occupation. Dereliction consists in the complete abandonment of the territory by a state owning it. When a state abondons a territoty, it cases to exercise sovereignty over it with the intention of having nothing to do with it in future, it loses the territory. Dereliction is complete when a territory is actually abandoned with the intention of altogether withdrawing sovereignty from it. The cases of *Santa Lucia* and of *Delagoa Bay*, in which dereliction was not held to be proved are important inasmuch as they lay down the principles of dereliction.

Spheres of Influence—This technical expression stands for one of the phases of occupation as a mode of acpuisition of title and owes its origin to the natural desire of States to bring under their sovereignty areas over which they have no effective control. An area wider than that over which a State has effective control has always been claimed by States acquiring title by occupation. It has been maintained that an effective occupation over a territory is sufficient to bring under sovereignty of the occupying State contiguous territory. States interested in extending their territories but unable to justify their sovereignty over areas not under their effective control find contentment in exercising an influence and excluding other States over such areas with a view to future effective occupation. *Oppenheim* observes : "The uncertainty of the extent of an occupation and the tendency of every colonising State to extend its occupation constantly and gradually into the interior or hinterland of an occupied territory, led several States with colonies in Africa to secure for themselves 'spheres of influence' by international treaties with other interested powers. Sphere of influence was therefore the description of territory exclusively reserved for future occupation by a Power which had effectively occupied adjoining territories."[1] The regions which a State wants to bring under its sovereignty at a future time and from which other States are excluded remain as shpere of influence. *Pitt Cobbett* describes spheres of influence thus : "A sphere of influence, so far as it can be said to possess a definite meaning, indicates a region generally inhabited by races of inferior civilization, over which a State seeks, by

1. Oppenheim : International Law Vol. I p. 313.

compact with some other State or States that might otherwise compete with it, to secure to itself an exclusive right of making future acquisition of territory and generally also, the direction and control of native inhabitants."[1]

The existence of spheres of influence in respect of a particular State implies no rights of sovereignty but give rise to inchoate rights The spheres of influence are secured by international agreements. *Hall* defines spheres of influence as "an understanding which enables a State to reserve itself a right of excluding other European powers from territories that were of importance to it politically as affording means of future expansion to its existing dominions or protectorates or strategically as preventing civilized neighbours from occupying a dominant military position." The creation of spheres of influence has the great merit of safeguarding the interests of States and of avoiding future conflicts.

Spheres of influence were created in many parts of Africa by agreements of 1890, 1891 and 1896 between Great Britain and France and those between Great Britain and Portugal. Again, agreements between Great Britain and Italy of 1891 and 1894, established spheres of influence in certain parts of East Africa. Such spheres were created in East and Central Africa by agreement of 1894 between Great Britain and Congo Free State.

Some writers apply the expression 'sphere of influence' to the territory of a weak State over which two States by agreements among themselves exercise some influence. The Persian territory became a sphere of influence under an agreement of 1907 between Great Britain and Russia. A State by entering into an agreement with a weak State with regard to some matters connected with its Sovereignty creates a sphere of influence. Such a sphere of influence was established when Great Britain entered into an agreement with Italy in 1925 about their interests in Abyssinia.

Spheres of interest.—A sphere of interest is different from a sphere of influence. The difference between the two lies in the objects they aim at. A sphere of influence is created with the aim of bringing the territory under sovereignty of the State which is interested in exercising the influence. Spheres of interest are on the other hand, created to obtain exclusive economic or financial concessions or exclusive rights of exploi-

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1. Pitt Cobbett: Cases on International Law 118-119.

tation in areas which are already effectively occupied by another States. These spheres of interest are established in territories of weak States and are intended to monopolize sources of profits and exploitation The agreement between Russia and Japan of 1907 whereby they created spheres of interest in Northern and Southern Manchuria and agreed to defend collectively their interests against foreign encroahments. may be taken as an instance.

The establishment of spheres of interest or influence is a matter of policy and not one of International Law. The agreements entered into for the purpose of creation of such spheres are permitted and governed by rules of International Law.

CHAPTER XVII

STATE SUCCESSION

Loss of international personality.—A State ceases to be an international person when it becomes extinct. The extinction of a State may be voluntary or forcible. It it voluntary when a State by its own act ceases to be a State in the sense of International Law. A State joining a federation becomes extinct by a voluntary act and loses its international personality willingly. The extinction is forcible when it ceases to be a State not by its own act but against its will by conquest or annexation. The internatioinal personality may be lost in part only. When the extinction of a State is not complete so that the State retains some of its personality, the extinction of the State is only partial. An independent State becoming a protectorate does not completely lose its personality. it retains a part of its international personality.

Important consequences which flow from complete extinction of a State are :—(1) All rights and obligations associated with the personality of the extinct State cease to exist.

(2) All political treaties concluded by the extinct State become nu land void.

(3) The rights of the extinct State at International Law cannot be enforced in its name. Similarly no international obligation can be enforced against the extinct State.

Succession of States.—The problems relating to State succession arise when the territory of one State becomes totally or partially part of the territory of another State or when the territory of one State becomes by dismemberment the territories of several new States or when the part of the territory of a State becomes the territory of new State as a result of a civil war. Some writers maintain that there is no succession of international person, for the rights and duties of a State as international person disappear on the extinction of that State This view is not wholly correct because although there is no general succession as regards the rights and obligations of the extinct State a devolution with respect to several rights and obligations of the extinct State by reason of possession by another State of whole or part of the territory of the extinct State does take place.

When one international person is substituted partially or wholly for another international person, a succession of international person takes place. Succession is either universal or partial.

Universal succession.—When either through subjugation or voluntary merger one State is completely absorbed by another State, the succession is universal. Universal succession involves complete absorption of one international personality into another. The complete absorption of a State may take place :—

(*a*) When a State voluntarily merges into one or several States. When a State joins a federation, it loses its identity, as occurred in 1845 when Republic of Texas was admitted as member of the American Union, or

(*b*) When the territory of a State is forcibly annexed by one or more States, as happened in the case of South African Republic and the Orange Free State which were included within the British Dominions; or

(*c*) When one State is split up into several States with the result that there are as many successors at Law as there are separate States.

In the case of universal succession the State which is absorbed becomes totally extinct and the State which has absorbed remains the same international person as before.

On such succession taking place the rights and obligations of the succeeding or absorbing State are regulated by the terms of the pact of union or by the treaty of cession or by the treaty of peace. In the absence of any such agreement, the position of the absorbing State with regard to the rights and obligations of the extinct State is as follows:—

(*a*) **Treaties obligations**—(1) The rights and duties associated purely with the international personality of the extinct State or arising from its purely political treaties disappear with the extinction and no succession in respect thereof takes place. Thus, the treaties of alliance, of arbitration, of neutrality or of any other political nature are abrogated. Similarly, treaties of commerce, navigation and of extradition which are purely personal in character fall to the ground and the absorbing State is not bound by them. In the case of annexation of Madagascar by France in 1896 the commercial treaties became extinguished. But those personal treaties which are recognised by the absorbing Government continue to be operative. In the case of *Terlindon* v. *Ames* it was held by the United States Supreme Court that extradition treaty made between the United States and Prussia prior to the formation of the German Empire continued to be operative after the union on the ground that the treaty had been officially recognised by Germany.[1]

(2) Succession takes place with regard to those rights which have become vested in the extinct State. Such international rights and duties of the State as are locally connected with its land, rivers, roads, railways and the like devolve on the absorbing State. Similarly, treaties concerning boundary lines, rivers, railways and the like remain valid and the absorbing State is bound by them.

(*b*) **Properties.**—Public properties and funds of the extinct State devolve on the absorbing State. The title to properties of the extinct State in third States, credits owing by the third States or their citizens to the extinct State, easements possessed by the extinct State in respect to the public or private property of the third States pass on to the

1. 184 U. S. 270.

absorbing State by succession. When a State is split up into several States the fiscal properties and funds of the extinct State are to be devided proportionally among the several new States.

(*c*) **Private rights.**—Succession of sovereignty has no effect on private rights The right to private property remains unaffected by change of sovereignty. The private rights of the nationals of the extinct State cannot be denied or injuriously affected by a change in the sovereignty. The Permanent Court of International Justice in its Advisory opinion in the case of German Settlers in Poland (1923) stated the rule thus: "Private rights acquired under existing law do not cease on a change of sovereignty ......It can hardly be maintained that, although the law survives, private rights acquired under it have perished ......It suffices for the purposes of the present opinion to say that even those who contest the existence in International Law of a general principle of State succession donot go so far as to maintain that private rights including those acquired from the State as owner of the property are invalid as against a successor in sovereignty." The principle is well recognised that change in sovereignty does not affect rights of private property acquired under the extinct sovereignty. The United States Supreme Court in the case of the *United States* v. *Perchaman* declared: "It may not be unworthy of remark, that, it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance, their relation to their ancient sovereign dissolved; but their relations to each other, and their rights of property remain undisturbed."

The rule laid down by the United States Supreme Court has been followed in England and other countries. It is now a rule of customary International Law that private property and the rights relating to it remain unaffected by a change of sovereignty.

(*d*) **Contracts.**—The absorbing State is bound by contracts entered into by the extinct State with third States or their citizens. Such contracts may either be with regard to public works or may be concessionary, *i. e.* contracts granting concessions to work up mines, running of a railway or the

like. But it is not clear that the absorbing State is bound by contracts giving rise to pecuniary liability of the extinct State. Generally debts contracted by the extinct State are taken over by the absorbing State.

The absorbing State is not liable for unliquidated damages for breach of contract committed by the extinct State. It is liable if the extinct State had agreed to pay compensation for breach of contract.

(*e*) **Tort**—The absorbing State is not liable for damages for tort or delict of the extinct State. But it is liable for damages for tort which had been acknowledged by the State and in respect of which the extinct State had agreed to pay compensation.

The successor State is not respectable for the unliquidated claim for damages in respect of international tort committed by the extinct State. It is however bound to pay the amount of damages which the extinct State had agreed to pay in respect of the tort committed by it or which it was directed to pay by a tribunal. In the *Hawaiian Claims* (1925) the Arbitration Tribunal laid down the principle that a State is not liable for the tort or delict of the extinct State. This rule applies both in cases of cession and conquest. The Hawaiian Claims case was one of voluntary cession. In the Claim Case of *Robert E.Brown*(1910)where the change of sovereignty was brought about by conquest the same principle was applied. *Hyde* observes: "Where the transfer is incidental to the extinction of a State that has been guilty of internationally illegal conduct, the new sovereign does not seem to be regarded as necessarily succeeding to the responsibility of the old. This is said to be true whether the loss of State life with the resulting change of sovereignty is attributable to the acts of a conqueror which by annexation seeks to reap the fruits of a military achievement or is the result of a voluntary arrangement reflecting the common desire of the parties thereto."[1]

(*f*) **Debts.**—There is no settled rule about the debts of the extinct State. Generally the debts of the extinct State are taken over by the new State or States. In the case of a State splitting up into several new States the debts are proportionally taken over by the new States.

Hyde states:—"Where one State succeeds to territory constituting the entire domain of another, it is said that the

1. Hyde : International Law Vol. I p. 437.

new sovereign succeeds also to the general fiscal obligations of its predecessor." It is universally recognised that the successor State which appropriates the territory of the extinct State takes over the debts of the extinct State. In case of complete absorption of a State by another there arises no question of apportionment. When a part of territory of a State is absorbed by another, a fair apportionment of the debts is needed. There are a number of cases where the successor State took over the debts of the extinct States. In 1839 Belgium took over a part of the debts of Netherlands. Turkish debts were taken over by Serbea, Montenegro and Bulgaria in 1878. By the Treaty of Lausanne (1912) Italy shared the burden of debts of Tripoli.

A State succeeding to the territory of an extinct State can challenge the validity of the claim for debts of the extinct State on the ground that those debts were incurred to prevent the territory from being transferred and that the creditor was aware of the risk involved in the loan transaction. *Westlake* observes : "Those who lend money to a State during a war, or even before its outbreak when it is notoriously imminent may be considered to have made themselves voluntary enemies to the other State, and can no more expect consideration on the failure of the side which they have espoused than a merchant ship which has entered the enemy's service can expect to avoid condemnation if captured." This provides an exception to the general rule that in case of absorption of a State, the substituted sovereignty assumes the debts and obligations of the extinct State and takes the burdens with the benefits.

There are cases where the debts have not been taken over. In 1845 the United States refused to bear the liability of the debts of the annexed Republic of Texas. In the case of the *West Rand Central Gold Mining Co.* v. *Rex* the British Court held that a creditor of the extinct State cannot claim to recover a private debt from the new State.[1]

The recent practice of States after the conclusion of Peace Treaties at the end of the First World War is to respect the acquired rights of private persons, whether proprietory, contractual or concessionary.

An important succession took place when there came into existence two States, *viz.*, India and Pakistan as a result of

1. (1905) 2 K. B. 391.

partition of the former undivided India in 1947. The assets and liabilities of the extinct India were divided under an agreement. The railways, telegraph lines, post offices and many other things were divided between India and Pakistan. The sterling balances were proportionately divided.

Effect of change of sovereignty on law.—A change in sovereignty of a State does not affect the law that prevails. "There can be no break or interruption in law. From the time law comes into existence with the first-feet corporateness of a primitive people, it must last until the final disappearance of human society. Once created it persists until a change takes place, and when changed it continues in changed condition until the next change, and so on forever. Conquest or colonisation is important to bring law to an end; in spite of change of constitution, the law continues unchanged until the new sovereign by a legislative act creates a change."[1] The principle is well settled that laws governing private and domestic rights continue to be in force even on change of sovereignty. *Hyde* states the rule that law of the land is not changed merely by change of sovereignty and observes: "This principle has been recognised by American tribunal in its application to laws protecting the private rights of the inhabitants of the territory concerned. It is not believed that even the public laws of the former sovereign form an exception and are directly affected by the transfer. It is doubtless true that such laws as are at variance with the constitution and laws of the new sovereign cease to operate, but the reason for such cessation is not to be ascribed to the bare change of sovereignty. It is attributable rather to conditions which are in themselves consequences of that change."[2] In *More* v *Steinbach*[3], the Supreme Court held: "Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States so far as applicable would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue."

It follows that private rights of the subjects acquired under the laws of the extinct State are to be respected by the successor State. But the successor State has no duty under the International Law to keep in tact the laws of the extinct State and not to change them The private rights can however be des-

1. Beale : Treatise on the Conflict of laws Section 131
2. Hyde : International Law Vol. I p. 397—398.
3. 127 U. S. 70.

troyed by change in law brought about by the successor State. The United States Court of Claims in the case of the *Philippine Sugar Estates Development Company* (1904) held that the general rule of International Law in regard to all conquered or ceded territory is that old laws continue until repealed by the proper authorities and that private rights acquired under the law of the extinct State remain unaffected.

Partial succession.—Partial succession takes place :—

(*i*) When as a result of a civil war a part of the territory of a State breaks off and takes up an independent position as a State. Such was the case of the United States of America which separated from Great Britain.

(*ii*) When an existing State acquires a part of territory of another State by cession or

(*iii*) When a full sovereign State loses part of its independence by joining a federation and coming under suzerainty or under a protectorate or when a not full-sovereign State becomes a full sovereign power.

In case of partial succession the devolution with regard to the rights and obligations of the State losing part of the territory is governed by the following rules.

(*a*) **Treaty obligations.**—In the case of a partial succesion in any of the ways stated above, the new State will not be entitled or liable under any personal treaties such as treaties of alliance, arbitration or commerce. But the new State will be bound by treaties which relate specifically to its territory such as treaties relating to boundaries, regulating navigation of rivers and treaties of cession. The new State is however not bound by political treaties of the parent State.

(*b*) **Property rights.**—(1) The existing State absorbing a part of the territory of another State succeed to vested rights such as rights of ownership of public property, easements of navigation and right of way, with corresponding local obligations.

(2) The absorbing State or the new State, as the case may be, will succeed to all the public domain and other public property and assets of the parent State connected with the territory acquired. It will also be bound by all the sovereign acts of the parent State done prior to serverance.

(c) **Debts.**—The new State or the absorbing State will be liable for all debts of the parent State which are locally connected with the territory acquired, such as debts charged on local revenues. It is, however, not liable for general debts of the parent State except under a special agreement. There are cases in which under agreements the new State or the absorbing State took over debts of the parent State. In 1839 Belgium took over a part of the debts of Netherlands. In 1878 Serbia, Motenegro and Bulgaria took upon themselves a part of the debt of Turkey. In 1912 Italy on acquiring Tripoli assumed a part of the debt.

In practice the public debts are generaly divided between the ceding territory and ceded territory and the debts falling to the ceded territory are taken over by the absorbing State. Inasmuch as in case of partial succession the financial stability of the parent State is generally distributed and arrangement with respect to general debts is often arrived at. In 1866 after the cession of Schleswing—Holstein by Denmark, Prussia agreed to take over the proportionate amount of debt. By the treaty of Lausanne of 1923 the Ottoman public debt was apportioned between the new Turkey and its parts which had separated.

Other Obligations.—(1) The new State or absorbing State succeeds to civil obligations locally connected with the territory acquired. Guarantees and concessions locally connected with the acquired territory continue to be operative.

(2) Personal contracts of the parent State do not bind the new State or the absorbing State.

(3) The new State is not at all liable for the torts committed by parent States before the severance of the acquired territory.

Succession on suppression of a revolt.—When a rival government established during a revolt is later on abolished on the suppression of the revolt which gave its birth, the question of succession of the property of the suppressed government arises. The rules with regard to the right to the property of the suppresssed government on foreign territory are :—

(a) Property originally belonging to the parent government but seized during civil war by the suppressed government can be claimed by the parent government by virtue of its paramount title.

(*b*) Property acquired by the suppressed government either as a result of subscriptions or by lawful seizures of prizes or in like manner is to be taken over by the parent government by succession.

CHAPTER XVIII

RECOGNITION OF STATES

1. Recognition in International Law.—The emergence of a new State or the existence of circumstances in which a new State or a new Government of a State is said to have emerged brings the principle of recognition into play. The recognition may be of a new State, a new Government of an old State or of billigerency. It is through recognition that a new State is regarded to have attained international personality. The new Government when recognised by other States acquires the capacity to deal internationally. It is also through recognition that insurgents come to be regarded as belligerents. International Law prescribes conditions which are to be fulfilled before a State becomes an international person, a new Government gets recognition and insurgents become belligerents. In the case of a community laying claim to Statehood, the act of recognition of the existing States of the international community perfects the Statehood. The existing States by their act of recognition certify that the new community claiming to be a State is fit to be admitted to the international community and has the capacity to discharge international obligations. The expression 'recognition' has acquired a definite meaning in international sphere. Recognition may be defined as an act of acknowledgement on the part of the existing States of the international community of the fact that the new community possesses the necessary qualifications of Statehood and is fit to shoulder the international obligations or that the insurgents have become belligerents or that the new Government has the capacity to enter into international relations. It will be instructive to bear in mind other definitions which are:

Oppenheim.—"Recognition is a declaration, on the part of the recognising State, that a foreign community or

authority is in possession of necessary qualifications of statehood, of governmental capacity, or of billigerency."[1]

Schwarzenberger—"Recognition may, therefore, be defined as acknowledgment of a situation with the intention of admitting the legal implications of such a state of affairs."

Institute of International Law defines the recognition of a new State as "the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organised, independent of any other existing State, and capable of observing the obligations of International Law, and by which they manifest therefor their intention to consider it a member of international community."

Fenwick.—"Recognition may be defined as formal acknowledgment by an existing member of the international community of the international personality of a State or political group not hitherto maintaining official relations with it."[2]

2. **Recognition, constitutive or declaratory.**—The question is whether recognition is merely declaratory in its nature.

There is a theoretical controversy over this question. Some jurists advanced the theory known as **constitutive theory** whereby they maintain that recognition confers statehood on a State and Governmental authority on a Government in international sphere and that it is through recognition that a State or Government attains international personality. There is another group of jurists who expound the theory which is known as **declaratory or evidentiary theory** whereby they maintain that recognition has merely a declaratory and not a constitutive effect and that recognition merely declares or evidences a fact that a particular community or Government possesses the necessary qualifications of a State or Government as required by International Law. They maintain that as soon as a community fulfils the necessary qualifications of statehood it becomes a State in the sense of International Law independently of any recognition by the old states and that the act of recognition is simply a formal acknowledgement of the existence of an established fact, namely, the existence of a State in the sense of International Law.

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1. Oppenheim : International Law Vol I p. 145.
2. Fenwick : International Law p.

3. Constitutive Theory Criticised.—According to this theory the act of recognition is a constitutive act, that is to say, it imparts international personality to the new community. *Kelsen* is of the opinion that the act of legal recognition is of a constitutive character. He says: "In view of the essential legal effect which the act of recognition has on the relation between the recognising and the recognised State, recognition of a community as a State must be considered as a constitutive act, just as the act by which a court ascertains that a contract has been concluded or a crime committed. No fact has by itself, legal effects; it has legal effects only together with the act by which the existence of the fact is ascertained. An act which has this legal effect is constitutive."[1] *Lauterpacht* also supports the view and rejects the view that recognition is an act of policy. He maintains that a State in the international community is under a legal duty to recognise a new State which possesses the necessary qualifications of statehood under the law. The International Court of Justice in its Advisory opinion on Conditions of Admission of a State to Membership in the United Nations was called upon to consider whether an existing State of the international community could refuse to recognise a new State which fulfilled the conditions necessary for statehood under Article 4 of the Charter The Court held that the decision as to whether or not a State deserved recognition was judicial and that the recognition could not be withheld or granted on considerations extraneous to the provisions of Article 4 of the Charter. This case is sometimes cited as supporting the Constitutive theory. It may he noted that the International Court of Justice in this case considered the question of admission to membership of the United Nations on the language of Article 4 of the Charter and did not express an opinion on the question of recognition of States. The decision cannot be held to support the constitutive character of an unilateral act of recognition.

The constitutive theory, besides being inconsistent with the practice of States, cannot be supported on any legal grounds. According to this theory a new State or a Government has no right to demand recognition and no State is in duty bound to recognise another State or Government. The act of recognition is a quasi-judicial function. A State, which arbitrarily withhold, recognition of a State or a community which has attained statehood in the sense of International Law acts improperly. It will, therefore, appear that a

1. Kelsen : Principles of International Law p. 271-272.

community which has the necessary elements of statehood under International Law has a right to be recognised and the other States cannot legitimately refuse to recognise it. The practice of States shows that recognition is granted or withheld in accordance with legal principles and precedence and political reason in most cases do not enter into the consideration of the question of recognition. Further it may be noted that the refusal for one State on political reasons to recognise a community as a State cannot prevent the other States from granting recognition, if it is really due. The recognition by some States as a State a community which really fulfils the requirements of International Law is enough to clothe this community with the rights and obligations of International Law irrespective of the fact that some other States have withheld recognition. There is another reason why the constitutive theory cannot be accepted. The fact that recognition dates back to the time when the recognised community in fact possessed the necessary elements of statehood shows that recognition does not by itself confer statehood on that community but that the State existed much prior to the date of its recognition. The other well established rule of law is that the courts of a new State will take into consideration not the date of recognition but the date on which that new State came into existence, that is to say, the date when the requirements of statehood were fulfilled. This rule again supports the declaratory or evidentiary theory. The result therefore is that recognition simply implies a declaration or evidence of the fact that a particular commmnity possesses the necessary qualifications of a State and nothing more and that does not confer statehood. The German-Polish Arbitral Tribunal (1929) declared that recognition of a State is not a constitutive but merely a declaratory act inasmuch as the State exists by itself and recognition is nothing but the ascertainment of that existence.

4. **Declaratory Theory.**—The act of recognition is declaratory of the existence of necessary qualifications of Statehood in the new community; it does not as a matter of law confers Statehood on it. The recognising State performs a judicial function when it proceeds to consider whether a particular community merits its recognition. The recognising State, by recognising a new community certifies or expresses its opinion that it passes all the qualifications of a State and does not make it a State when it lacks the essential elements of Statehood. Brierly observes; "It is not a 'constitutive' but a 'declaratory' act; it does not bring into legal existence a State which did not exist before. A State may exist without being

recognized, and if it does exist in fact, then, whether or not it has been formally recognised by other States it has a right to be treated by them as a State." Recognition is an act done subsequent to the emergence of a new community and is therefore related to what has already come into existence. The recognising State declares its opinion on the existing conditions.

5. **Correct view.**—The correct view seems to be in favour of the declaratory theory. The practice of States supports this view. The States which fail to get recognition are still States and are treated as subject of International Law. Non-recognition does not take away what the State 'not recognised' already possesses. If the act of recognition is regarded as a constitutive act, the non-recognition can properly be regarded as depriving the non-recognised State of something it possessed. In actual practice States which have not been recognised continue to be subject to International Law. The recent case, in which Great Britain demanded compensation from Israel which had not been recognised by it and whose airmen shot down British aeroplanes over Egypt, illustrates the practice of State to the effect that they regard the unrecognised state as subject of International Law. The case of Red China furnishes another good example as to the practice of States. Red China has not been recognised by the United States of America and is not a member of the United Nations. India has accorded recognition to the Red China. This non-recognition on the part of the United States and the refusal of membership by the United Nations has not affected the Government of Red China which continued to have relations with other States. Even the United Nations representative when conducted the cease-fire negotiations in Korea dealt with the representatives of the Red China. There are many cases in which States which had all the qualifications of Statehood secured recognition after a long time and they continued as full fledged States having international relations in the meantime. The independence of Portugal which had seceded in 1640 was recognised by Spain in 1688. Spain and Portugal recognised the South American States long after they had been recognised by the United States of America and Great Britain. According to the constitutive theory these States would be held to be outside the sphere of International Law but in practice they were subjects of International Law.

It is an established rule of International Law that recognition is retroactive in its effect, that it to say, that the international personality of the new community does not come into existence from the date of the recognition but from the

emergence of the new commuuity into Statehood. This rule was reaffirmed in the case of Luther v. Sager (1921) 3 K.B. 532. Now, this rule is wholly inconsistent with the constitutive theory and lends support to the declaratory theory. The case of Wulfsohn v. Russian Federated Soviet Republic decided by the Court of Appeals of New York is an authority for the proposition that recognition does not create a State and that whether or not a new community attained Statehood could be established by proof other than that furnished by recognition.

It was observed in the case of the Tinoco Concessions (1923) "But it is urged that many leading powers refused to recognise the Tinoco Government, and that recognition by other natives is the chief test and best evidence of the birth, existence and continuity of succession of a Government. Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a Government in the society of nations." The emergence of a new community into Statehood is quite different from its recognition by other States as an international person. Recognition is declaratory in character and has not the effect of creating a State Further, in the case of Dentsche Kontinental-Gasgesellschaft 1931) the German Polish Arbitral Tribunal held that "recognition of a State is not a constitutive but merely a declaratory act. The State exists by itself, and recognition is nothing but the ascertainment (constatation) of that existence"

According to Hall that as soon as a community fulfils the requirnents of a Statehood it has a right to be treated as an independent State and recognition cannot properly be withheld. This appears to reject the constitutive theory and to be in favour of the other view.

6. International Personality, how acquired.—As already stated International Law began to take concrete shape about the middle of 17th Century within the group of European powers anxious to maintain good relations with one another The States forming this group represent the original members of the family of Nations and may be called "Charter Members". With the passage of time new members were taken in by the charter members and this led to the enlargement of the international community. State-hood alone does not imply membership of the international community and a new State has to be recognised by the members of the international community before it becomes an internatinal person. The procedure by which a State acquires membership of

the international community is known as 'recognition'. This recognition is nothing but a formal acknowledgment by existing members of the international community of the fact that the State seeking membership is qualified to fulfil the obligations imposed by International Law Recognition is not an act of arbitrary discretion or a matter of political concession. It is through recognition that a State attains international personality and the act of recognition must proceed on some well defined legal principles. The recognising State is to exercise a quasi-judicial function under the International Law when recognition is to be accorded to a new State The practice of the States shows that the act of recognition is not arbitrary but legally performed by the members of the international community and recognition cannot be granted or refused at the sweetwill of the recognising State. We will now consider this recognition of States in its various phases.

7. **Recognition of revolting territories**—The real question of recognition arises when a subject people shake off a foreign yoke or a part of a state breaks off from its mother-Country and takes up an independent position in the course of a revolution. The members of international community on whom falls the duty of granting or refusing recognition is to consider whether the new State has been firmly established. In the case of a civil war the insurgents can be recognised as belligerent power if they succeed in establishing a government on a part of the territory and in conducting their military operations according to the rules of International Law. The recognition of insurgents as belligerent power is different from recognition of the insurgents as a new State. Premature recognition of revolting community as a new State is unlawful inasmuch as it will be regarded by the mother-Country as inteference with its legal right to control its subjects. The permature recognition by France of the United States of America in 1778 led Great Britain to make a declaration of war against France. In the case of revolting community setting up a new State recognition has to be slow and careful. The revolting community can be said to have attained state-hood for purposes of recognition only when either it has utterly defeated the mother-Country or the mother-Country has ceased to make efforts for subduing the revolting community or has become incapable of subduing it. The recognition by the mother.Country of the independence of the revolting community is a sure indication of the fact that new State

is firmly established and has qualified itself to be a international person.

8. Recognition of Insurgency.—It is not necessary that insurgents may always be recognised as a belligerent power, for recognition of belligerency implies the existence of a organised political group in effective control of a certain territory. When insurgents are unable to control a certain territory and are not sufficiently organised to offer resistance to the mother-Country and therefore not in a position to comply with the rule of International Law as to war, they cannot be recognised as belligerent but can be recognised as insurgents only. The necessity of granting the recognition of insurgency arises when other States while refraining from treating the insurgents as mere law breakers recognise them as persons in *de facto* authority and consider it advisable to keep good relations with them Thus conception of recognition of insurgency was invented to meet the situation arising out of the rebellions which took place on the American Continent by the end of the 19th century. In 1895 President Cleveland recognised the insurgency of Cuban revolutionists and enjoined the observance of the neutrality laws.

9. Recognition of new heads and of Governments of old States.—The recognition of new State is different from recognition of new heads and of governments of old States. The recognition of a new State implies admission of a new political group into the membership of International community and involves the decision that the new State is firmly established and is capable of discharging international obligations but recognition of new head or of new form of government of an old State which is already an international person involves no such decision.

When a change in the head of a State takes place it has usually to notify the change to other States The other States usually recognise the new head by sending congratulatory messages. This happens when the change in the head of a State takes place in a normal and constitutional manner. But when a change in the head of a State takes place as a result of a revolution and not in a constitutional manner difficulty arises, for recognition in such a case involves the decision that the new head can properly be regarded as representing the State. The other States are thus called upon to exercise a quasi-judicial function in granting or refusing recognition to the new head. In international

practice a new head if it really represents the State is easily granted recognition by other States.

Recognition of a change in government of an old State is not always easy. International Law recognises the fundamental principle that every people have a right to a form of government of their choice. A change in the government taking place in a normal constitutional manner is readily recognised and the other States usually signify their recognition. But difficult questions arise when their happens a forcible overthrow of the existing government or when the new government comes into being by unconstitutional means. In such cases International Law has provided two tests; an *Objective Test* and a *Subjective Test*. The objective test lies in the fact that the new government is *de facto* government, that is to say, the new government is in effective control of the State and is exercising its authority without substantial opposition. If the new government appears to have control over the machinery of the government with the acquiescence of public opinion and in the absence of organised resistance the objective test must be held to have been satisfied.

The subjective test lies in the fact that the new government is prepared to carry out the obligations of a State imposed by International Law. It would appear that a government how-so-ever established must be deemed to be in a position to carry out international obligations and a new government can be no exception. But the question that is and has been raised in cases of the new governments coming into power by unconstitutional means is whether the new government coming into existence by disregarding the constitution will respect the international obligations. When the new government has got stability and is founded on democratic principles there should be no reason to doubt its willingness to carry out international obligations. But States in which revolutions are frequent and new governments rise only to fall, an enquiry as to whether the new government has an intention to carry out international obligations must precede the act of recognition by the other States. If it is shown either by the declaration of the new government or by other conduct that the intention to carry out international obligations exists, the other States will grant recognition. In actual practice the recognising States sometimes take it for granted that the new government has an intention to fulfil international obligations and the new governments more often than not make a declaration of

such an intention But this practice cannot dispense with the necessity of applying subjective test which has the approval of the jurists. America granted recognition of the new government that was set up in France as a result of the French Revolution on the presumption that the new government would observe international obligations of France. This subjective test was also applied to the case of Soviet Russia which came into existence as a consequence of the revolution of 1917.

Recognition of a community as a State.—The mere fact that a community of people is a State within the meaning of that word as defined in the earlier chapter does not imply that it is a member of the community of Nations or an international person. It has to get recognition from the existing members of the Family of Nations before it can attain international personality. Whether or not the community fulfils the requirements of a State in the sense of International Law is to be judged by the other States. If the other States decide that a particular community of people is a State to which International Law can be applied they will readily admit that community into the membership of the Family of Nations. As soon as it enters as a member into the international community the International Law applies to it. There is a heavy duty cast upon the recognising States in making their decision on the question whether a particular community satisfies the requirements of a State as understood in International Law. Their decision cannot be arbitrary or perverse for if they recognise as a State a community which does not fulfil the requirements of International Law, they are guilty of violating International Law. If on the other hand they refuse recognition to a community which fulfils the requirements of International Law they violate International Law. It is therefore necessary for the recognising States to be very careful in their decision and to refuse or grant recognition judicially. Recognition of a community as a State may be implied. It was a case of an implied recognition by the British Government which declared in 1949 its intention to demand compensation from the Government of Israel for shooting down of aeroplanes when great Britain did not till then recognise Israel as a State. The demand of reparations by Great Britain implied that it recognised Israel as a State.

Consequences of recognition.—Some of the important consequences which flow from the recognition of a State are :—

(*i*) The recognised State or Government acquires the capacity to enter into diplomatic relations with other States and to make treaties with them.

(*ii*) In the case of a recognition of a new government of an old State the previous treaties of the predeccessor of the new government are automatically revived and come into force.

(*iii*) The recognised State or the government gets a right of suing in the courts of the recognising State.

(*iv*) The recognised State or the government acquires for itself and its property immunity from the jurisdiction of the courts of law of the recognising State.

(*v*) The recognised State or the government becomes entitled to demand and receive possession of the property lying within the jurisdiction of a recognising State.

(*vi*) The courts of law of the recognising State is, after recognition, precluded from questioning the legality or validity of the legislative or executive acts of the recognised State and of the government.

(*vii*) The other States become subject to various obligations under International Law with respect to the recognised State or government.

(*viii*) The recognised State or the government becomes bound to respect international obligations in general and with respect to the recognising States in particular.

12. **Recognition of government in exile.**—The government of a State is said to be in exile when during the course of war on the occupation on the territory of a State by enemy force government of that State is established temporarily on the land of some friendly State. The occupation of the territory by the enemy during war cannot imply that the enemy has got effective control over the territory and the government though in exile and not in effective control of the territory will be deemed to be making efforts to reestablish itself. As long as the war is going on and the government in exile is making effective efforts to regain the effective control of its territory the belligerent occupation will be deemed to be only temporary The government in exile can be recognised as the government of the occupied territory so long as it continues its efforts through war to regain control of its territory. The failure of the government in exile to regain control

of the territory at the termination of war will disentitle it to be recognised as the government of the State. Recognition of governments in exile is based on the same principle as recognition of governments in general. A government in exile which is unconstitutionally established may be recognised in accordance with principles of recognition of new governments coming into power by unconstitutional means. Recognition may be implied in the act by which a friendly State consents to the establishment of the government in exile on its territories.

13. Recognition of Insurgents as a belligerent power. The recognition of insurgents as belligerent power resembles recognition of a community as a State and is altogether different from recognition of insurgency. When a State is involved in a civil war and the insurgents gain effective control over a part of the territory and the people of the State involved in civil war, the entity resembling a State comes into existence and International Law cannot fail to take notice of it. Recognition of insurgents as a belligerent power depends on the existence of the following facts :—

(*i*) that the insurgents have a government and the military organisation of their own.

(*ii*) that the insurrection is conducted in the technical form of war. In other words, when the civil war assumes the true character of an international war especially regarding the means of destructions used by the parties.

(*iii*) that the insurgents have an effective control over a certain part of the territory of the State involved in civil war.

If the above facts exist in a particular case the insurgents are entitled to recognition as a belligerent power legal consequences that flow from recognition of the insurgents as belligerent power are :—

(*i*) The rules of International Law as to war and neutrality apply to the relations between the recognising State and the insurgents recognised as belligerent power. The recognising State takes the position of a neutral State with regard to the government of the insurgents and the legitimate government of the State against which insurrection is directed. If the legitimate government has recognised the insurgents as belligerent power the persons involved in the civil war falling into the hands of the opposite party

are regarded as prisoners of war and cannot be prosecuted as criminals or for high treason or murder by the legitimate government.

(ii) Insurgents assume a *defacto* international character in respect of the rights and duties of legal warfare. The insurgents get right of admission of their ships into the ports of the recognising State and the right of visit and search on open sea.

Premature recognition of the insurgents as belligerent power is regarded as an unfriendly act by the legitimate government.

14. Recognition and membership of the United Nations.—The question is whether an unrecognised State admitted to the membership of the United Nations stands in need of recognition. According to the provisions of the article 4 of the Charter of United Nations all peace-loving States accepting the obligations contained in the Charter and in the judgment of the Organisation able to and willing to carry out those obligations are entitled to the membership of the United Nations. It is further provided that the admission of the States to the United Nations will depend upon the decision of the General Assembly on the recommendation of the Security Council. The above provision cannot be interpreted to mean that only States which have been recognised by other States can be admitted to the membership of the United Nations. Correctly interpreted the provision in the Charter entitles a non-recognised State to become a member of the United Nations. As soon as a State becomes a member of the United Nations it becomes subject to all obligations imposed by International Law with regard to the other members of the United Nations. The act of United Nations in admitting a State to its membership must be interpreted to be an act of recognition on behalf of all its members. Further the resolution of the General Assembly on the recommendations of the Security Council recognising as a State a community which has not yet been recognised amounts to a collective decision of all the members of the United Nations. The provision in the Charter relating to admission of States as member of the United Nations embodies the collective desire of the peoples of the United Nations. The result therefore is that if a State not yet recognised when admitted to the membership of the United Nations gets collective recognition and the other States need not individually confer recognition on it.

It would be inconsistent with the spirit of the Charter for the members of the United Nations to refuse recognition to a State which has been admitted to the membership of the United Nations and which enjoys equality with them. The Preamble of the Charter expresses the determination on the part of the members 'to live together in peace with one another as good neighbours. It is obligatory therefore on the members of the United Nations in keeping with their determination of the Preamble to regard a State admitted to membership by the General Assembly as validly recognised by them and as a good international person.

15. Stimson Doctrine. The position taken up by Mr. Henry L. Stimson Secretary of State of the United States of America on the Japanese invasion of Chinese Province of Manchuria in June, 1932 was that his country, that is, the United States of America did not intend to recognise any situation, treaty, or agreement which might be brought about contrary to the covenants and obligations of the Pact of Paris of 1928 to which treaty both China and Japan as well as the United States of America were parties. The principle laid down by the Secretary of State was that a situation brought about illegally, that is to say, in violation of International Law could not be legalised by the act of recognition and this is known as the Stimson Doctrine after the name of its propounder. The force of this principle was recognised by the Assembly of League of Nations which on March 11, 1932 adopted the resolution declaring that "it is incumbent upon the Members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenants of the League of Nations or to the Pact of Paris."

16. The Estrada Doctrine.–This is named after the Foreign Minister of Mexico, Senor Estrada who in a note addressed to diplomatic representatives of Mexico dated September 27, 1930 made a declaration of the policy of his Government. His note stated that the Government of Mexico had informed its Ministers that it "is issuing no declarations in the sense of grants of recognition since that nation considers that such a course is an insulting practice and one which in addition to the fact that it offends the sovereignty of other nations implies that judgment of some sort may be passed upon the internal affairs of these nations by other Governments, inasmuch as the latter assume, in effect, an attitude of criticism when they decide favourably or unfavourably as to the legal qualifications

of foreign regimes. Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents and to the continued acceptance, also when it may deem advisable of such similar accredited diplomatic agents as the respective nations may have in Mexico, and in so doing, it does not pronounce judgment, either precipitately or posteriori, regarding the rights of foreign nations to accept, maintain or replace their Governments or authorities."

This doctrine is not consistent with the established practice of States and advises a new course of action. It affirms the duty of continuing diplomatic relations in disregard of the revolutionary changes in the States. The doctrine has made with criticism. It eliminates a subjective test of the ability of the new Government to shoulder international obligations and replaces declaration of recognition by the act of maintaining diplomatic relations. Fenwick criticizes this doctrine on the ground that it is based on a "mistaken interpretation of the practice of recognition involving an enquiry into the legitimacy of the new Government, when the inquiry is actually into its representative character."

17. De facto and De jure recognition.--International Law both in theory and practice draws a distinction between *de facto* and *de jure* recognition. Recognition *de facto* is provisional and can be withdrawn while *de jure* recognition is legally binding and permanent. Recognition *de jure* implies that the State or Government in question is fully qualified to be a member of the international community. Recognition *de facto*, on the other hand, implies a temporary and provisional acknowledgment on the part of the recognising State to the effect that the State seeking recognition is in fact qualified to be a member of the international community. *De facto* recognition means that the new State or Government though independent and in effective control of the territory has not acquired sufficient stability so as to be able to fulfil international obligations. The modern practice of the States is to grant in the first instance *de facto* recognition to new States and to Governments coming into being as a consequence of revolution and to grant *de jure* recognition after sometime. The Governments of Finland, Latvia and Esthonia which were a part of Russian Empire and which became independent after the First World War were in the first instance only recognised *de facto*. The State of Soviet Russia was recognised *de facto* only for a number of years by

many States on the ground that in their opinion the Soviet Government was unable to fulfil international obligations. *De facto* recognition is liable to be withdrawn if the State or Government in respect of which *de facto* recognition was granted fails to satisfy the requirements of full recognition. *De facto* recognition may be regarded as a prelude to the permanent type of recognition, that is, *de jure* recognition. The Soviet Government was recognised *de facto* by Great Britain in 1921 ; the *de jure* recognition came in 1924. Similarly the Italian conquest of Abyssinia was *de facto* recognised in 1936 by Great Britain but it was recognised *de jure* in 1938. Some States make a sharp distinction between *de jure* and *de facto* recognition. According to the practice of some countries including Great Britain the State recognised *de facto* is not entitled to full diplomatic intercourse or to diplomatic immunities. According to the practice of the United States representatives of a Government recognised *de facto* enjoy diplomatic immunities.

Recognition *de jure* being permanent in its nature is usually granted when it appears to the recognising State that there is no need for any reservation and the future of the new State or Government is completely assured. The grant of *de jure* recognition presupposes the existence of the facts :—

(1) that there is reasonable assurance of stability and permanence of the new State or Government ;

(2) that the new State or the Government commands the general support of the population.

(3) that the new State or the Government is both able and willing to fulfil its international obligations.

The distinction between *de jure* and *de facto* recognition is not one of form but of substance. The State or Government recognised *de jure* can claim to receive property situate within the recognising State while the State or Government recognised *de facto* can make no such claim. It is only the State recognised *de jure* that can represent the old State in matters of State succession. The case of *Haile Selassie* v. *Cable and Wireless Ltd.* raised an important question regarding the rights of government recognised *de facto.* Cable and Wirless Ltd. entered into a contract with the Government of Ethiopia prior to the Italian conquest of Ethiopia. As a result of this contract Cable and Wireless Ltd. owed a certain sum of money to the Ethiopian Government. After the Italian

conquest the Emperor of Ethiopia who had been recognised as *de jure* sovereign sued for the recovery of the debt in an English Court. The Italian Government had been accorded *de facto* recognition by the British Government. The court of first instance held that the Emperor of Ethiopia who was the *de jure* sovereign had, in spite of the fact that the Italian Government had been recognised as being in control *defacto*, the right to sue for the debt. The defendant appealed and while the appeal was pending the British Government retrospectively recognised the king of Italy to be *dejure* Emperor of Ethiopia. The result was that the Court of appeal dismissed the claim on the ground that plaintiff was neither the *de facto* nor the *de jure* sovereign of Ethiopia.[1]

It may, however, be noted that the acts of the government recognised *de facto* with respect to persons and property of the governed territory are considered valid as compared to the acts of the *de jure* government which are regarded as nullity. In the case of the *Bank of Ethiopia* v. *National Bank of Egypt and Ligouri* it was held that the decree of the Italian Government which had been recognised as being in control *de facto* of Abyssinia was valid and effective.[2] This case was followed in another case *Luther* v. *Sagor* where it was laid down that the acts of the Soviet Government which had been recognised *de facto* by the British Government must be treated by the courts with all the respect due to the acts of a duly recognised Sovereign State[3] The acts of the Government recognised as *de facto* government of the territory were held to be valid as compared to the acts of the *dejure* government in the recent case of *Banco de Bilboa* v. *Sancho and Rey*.[4]

According to Prof. H. A. Smith the British practice about *de jure* recognition is : "The normal policy of this country for over a hundred years has been to insist upon certain conditions as a precedent to the grant of *de jure* recognition of a new State or a new Government. We have required, first, a reasonable assurance of stability and permanence. Secondly, we have demanded evidence to show that the Government commands

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1. (1939) Ch. 182.
2. (1937) Ch: 517.
3. (1921) 3 K. B. 582.
4. (1938) 2 K. B. 176.

the general support of the population. Thirdly we have insisted that it shall prove itself both able and willing to fulfil its international obligations."

18. Recognition, express or implied.—Recognition may be either express or implied. It may be expressed in notification or declarations or it may be inferred from some conduct on the part of the recognising States. The conduct is to be such as may clearly show an un-equivocal intention to recognise. Recognition *de jure* may be implied from the following:—

(*a*) The conclusion of bilateral treaties between the recognising and recognised States, such as treaties of commerce and navigation.

(*b*) The formal initiation of diplomatic relations between the recognising and the recognised States.

(*c*) The issue of Consular exequatur by the recognised State to the recognising State.

(*d*) In the case of recognition of belligerency a proclamation of neutrality.

But no recognition *de jure* can be implied from the following :—

(*a*) Participation in an international conference in which the unrecognised State takes part.

(*b*) The signing of a multilateral treaty to which the unrecognised State is a party.

(*c*) The retention of diplomatic relations for an interim period.

(*d*) Communications reminding unrecognised State of its obligations under a multilateral treaty.

(*e*) Request for and grant of extradition.

(*f*) Maintenance of contact with the insurgents during a civil war.

19. Withdrawal of recognition.—It has already been stated that *de facto* recognition is provisional and revocable. The question is whether *de jure* recognition can be withdrawn. Recognition implies that the recognised State or Government possesses the qualification required under the International

Law. The State Government which has been recognised *de jure* may undergo a change with the result that the State may lose its independence and the Government may cease to have effective control over the territory. Whenever such a change occurs the State or Government loses its status in the eye of International Law and cannot claim to remain recognised.

The institute of International Law in 1936 resolved that recognition *de jure* of State was irrevocable and that such recognition ceases to have effect in case of a definite disappearance of one of the essential elements of statehood obtaining at the moment of recognition. This resolution envisages the possibility of withdrawal of recognition on the hitherto recognised State losing the necessary element of statehood in the sense of International Law. The recognising State on being convinced that the recognised State has lost the necessary element of the Statehood or that the recognised Government is lacking in its Govermental capacity is entitled to withdraw its recognition. In the case of withdrawal of *de jure* recognition by the recognising State would require most stringent proof of the fact of disappearance of the necessary elements of statehood or of Governmental capacity.

It is not necessary that the withdrawal of recognition should be expressly declared. Express withdrawal whenever made takes the form of a notification to the authority from which recognition is withdrawn The withdrawal of recognition of Government is implicit in the grant of *de jure* recognition of the rival Government which has been established. Thus Great Britain withdrew its recognition of Abyssinia as an independent State by giving *de jure* recognition to the annexation of that country by Italy. The implied withdrawal of recognition *de jure* cannot be inferred except from an act which unequivocally expresses an intention to withdraw. When a State withdraws recognition in respect of another State or Government the latter ceases to have legal existence as a State or Government in relation to the former.

20. Recognition retroactive in effect.—Recognition is retroactive in its effect and operates to validate all actions of the new State or Government not from the date of recognition but from the date of the coming into being of the State or the Government. The rule of retroactivity of recognition is based on convenience and good-will. According to this rule

the acts of the Government or the State prior to its recognition are to be regarded legally effective.

21. **Recognition political or legal act**.—The admission of a new community into the society of States depends on recognition by the existing States of that society. Serious consequences follow recognition The act of recognition is performed not arbitrarily but judicially. The question however is whether recognition implies a legal or political act. Brierly answers the question thus: "The truth seems to be that the granting of recognition to a new State is a political rather than a legal act. A new community claiming statehood generally possesses the necessary qualifications of an international personality, but it has no right to demand recognition as a matter of right. The recognising States have to act judiciously in granting or withholding recognition. Their act cannot be said to be a political act for recognition brings into existence a general relationship between them and the recognised State. The act of recognition by one State influences the other States and cannot be performed arbitrarily. The recognising State has to proceed cautiously in the matter for it knows that unless it acts impartially and judiciously its decision would be valueless in the international community and the other States would in disregard of her decision grant recognition The circumstances in which the States are placed in the modern world counsels caution and exclude the play of arbitrariness. The recognising State has to form a legal opinion as to the status of the new community and to give its decision consistent with the principles of law. Its act cannot be considered to be one of policy. The general practice of States shows that more often than not the States have acted judicially in granting or withholding recognition. *Oppenheim* on the practice of States observes: "The bulk of the practice of States probably supports the view that Governments do not deem themselves free to grant or refuse recognition to new States in an arbitrary manner, by exclusive reference to their own political interests and regardless of legal principles".

Kelsen in order to support the constitutive theory which he himself had in his earlier writing rejected two kinds of recognition, namely, the political recognition and the legal recognition. He defines political recognition to mean that the 'recognizing State is willing to enter into political and other relations with the recognised State, relations of that kind which normally exist between members of the family of nations". Legal recognition is defined as meaning that "the recognising State ascertains that the recognised community is a State in

the sense of International Law." The distinction between the two kinds of recognition is not however supported by practice of States. An act of recognition on the part of the recognising State is enough and operates as an estoppel. Schwarzenberger is of the view that "the legal effect of every act of recognition is to create an estoppel." In the case of the Eastern Greenland (1933) the Permanent Court of International Justice applied the principle of estoppel to the act of recognition by Norway observing thus : "In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognised the whole of Greenland as Danish ; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland and in consequence from proceeding to occupy any part of it." Now, an act of recognition would operate as estoppel. A State cannot say in defence that it was political and not legal recognition that it granted. A State cannot grant one kind of recognition and with-hold the other kind. The distinction drawn is without a difference for if the recognising State has to enter into political and other relations with the recognised State, it brings into existence a legal relationship which attracts the obligations of International Law and these legal and political recognitions mean the same thing.

The act of recognition is a legal act. But it cannot be denied that sometimes political considerations do play a part in the decision of the recognising State. Cases of grant of recognition on political grounds are very few. The refusal of the United States of America to recognise the Red China is no doubt based on difference in political ideologies of the two countries. The recognition of Soviet Government of Russia by the United States of America was delayed till 1933 on political grounds. These cases in international sphere where politics plays an important part in the activities of the States do no doubt occur. But such cases are insufficient to warrant an inference that recognition is a political act or that political considerations weigh with the States in granting or withholding recognition.

CHAPTER XIX

NATIONALITY

Nationality Defined and Explained.—The term Nationality in law connotes a status of an individual as belonging to particular State. A national of a State means an individual

who is the subject of that State. The term has reference to a nation in the sense of a State and not in the sense of a race. The British-Mexican Claims Commission in the case of the R. J. Lynch Claim (1929) explained the concept of nationality thus : "A man's nationality forms a continuing State of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the Sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his memberhip of an independent political community. This legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the State. If the citizen leaves the territory of his sovereign State and goes to live in another country the duties and rights which his nationality involves do not cease to exist, although such rights and duties may change in their extent and character. A man's nationality is not necessarily the same from his birth to his death. He may according to circumstances lose his nationality in the course of his life. He may elect to become a citizen of another sovereign State." Some well-known definitions are :—

Fenwick.—'Nationality may thus be defined as the bond which unites a person to a given State which constitutes his membership in the particular State which gives him a claim to the protection of that State, and which subjects him to the obligations created by the laws of that State.[1]

Oppenheim.—'Nationality of an individual is his quality of being a subject of a certain State and therefore its citizen.'[2]

Starke.—'It may be defined as the status of membership of the collectivity of individuals whose acts, decisions, and policy are vouchsafed through the legal concept of the State representing these individuals.'[3]

Kelsen.—'Citizenship or nationality is the status of an individual who legally belongs to a certain State or—formulated in a figurative way—is the member of that community.'[4]

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1. Fenwick—International Law (Third Ed.) p. 253.

2. Oppenheim—International Law. Vol. I. (Seventh Ed.) p. 585—586.

3. J. G. Starke—An introduction to International Law (Second Ed.) p. 214.

4. Hans Kelsen—Principles of International Law p. 248.

Hyde.—"Nationality refers to the relationship between a State and an individual which is such that the former may with reason regard the latter as owing allegiance to itself."

Harvard Draft Convention on Nationality.—Defines 'nationality' as the "Status of a national person who is attached to a State by the tie of allegiance."

It is clear from the above definitions that nationality constitutes a relationship recognised in law between an individual and the State to which he belongs. Nationality may be stated to mean membership of a particular State. In Re Lynch the United States—Mexico General Claims Commission explains the concept of nationality thus :—

'A man's nationality is continuing legal relationship between the sovereign State on the one hand and the citizen on the other. Fundamental basis of a man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both, on the part of the citizen no less than on the part of the State.'[1]

Nationality and International Law.—As already stated nationality constitutes a legal relationship between an individual and the State to which he belongs or owes allegiance. Nationality is the concern of the Municipal Laws of a State and International Law has left every State free to frame its own laws to regulate the acquisition and loss of nationality. The United States Supreme Court in the case of *United States* v. *Wong Kim Ark* observed : "It is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws what classes of persons shall be entitled to its citizenship "[2]

International law does not prescribe any rules governing the acquisition and loss of nationality. The rule is well established that the question whether an individual possesses a nationality is to be decided by the Municipal Law of a State the nationality of which that individual alleges to possess. In the case of *Stoeck* v *Public Trustee*, it was held that : "The question to what State a person belongs must ultimately be decided by the

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1. Annual Digest of Public International Law Cases 1929-1930. p. 221 . o p. 223.
2. 169 U. S. 649 .

Municipal Law of the State to which he claims to belong or to which it is alleged that he belongs."[1]

The Hague Convention of 1930 on the Conflict of Na ionality Laws has affirmed this principle and provides that the laws framed by a State regulating acquisition and loss o nationality shall be recognised by other States in so far as they are consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality. The convention further laid down that any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

The importance of the legal, concept of nationality lies in the fact that a nationality carries with it certain rights and duties. A national of a State is entitled to certain privileges in his home State. He is also under an obligation to perform certain duties. Besides these rights and duties under the Municipal Laws, an individual in his capacity as a national of a State is entitled to certain benefits of International Law. An individual gets these benefits through the State of which he is a national. Oppenheim therefore describes nationality as 'the principal link between the individuals and the benefits of the laws of Nations' An individual who does not possess any nationality cannot derive any advantage from the existence of International Law. It is the recognised rule of International Law that a State in the exercise of its territorial supremacy can deal with its nationals and foreigners without any nationality present on its territory in any manner it likes. But this supremacy finds its restrictions in the rule of International Law which make it obligatory on a State to show certain fundamental considerations to nationals of foreign States present on its territory. Again International Law recognises the right of each State to protect its nationals while abroad. A State is competent to demand redress of the wrong done to its national while present on the foreign territory. It can do nothing if the individual is not its national. It will therefore appear that the question whether an individual is or is not a national of a State becomes important in all cases in which it becomes necessary to invoke rules of International Law for the benefit of an individual. According to *Oppenheim* "the function of nationality becomes apparent with regard to individuals abroad or to property

1. (1921) 2. Ch. 67 at p. 78.

abroad belonging to individuals who are present within the territory of their home State on account of one particular right viz. the right of protection over its citizens abroad which every State holds and one particular duty viz. the duty of the State to receive back its nationals who are not allowed to remain in foreign territory."

According to Starke the important incidents of nationality at International Law are :—[1]

1. "The right to diplomatic protection abroad is an essential attribute of nationality". A State has a right to protect its citizens while abroad. The State can claim redress through diplomatic channels of the wrong done to its nationals while on the foreign territory.

2. "The State of which a particular persons is a national may become responsible to another state if it has failed in its duty of preventing certain wrongful acts committed by this person or of punishing him after these wrongful acts are committed."

3. "It is the duty of a State to receive back on its territory its own national."

4. 'Nationality imports allegiance, and one of the principal incidents of allegiance is the duty to perform military service for the State to which such allegiance is owned.'

5. "A State has a general right to refuse to extradite its own nationals to another State requesting surrender."

6. "Enemy Status in time of war may be determined by the nationality of the person concerned."

7. "States may frequently exercise jurisdiction on the basis of nationality."

It will, therefore, appear that occasions are many where nationality assumes importance in International Law notwithstanding the rule that nationality depends on the Municipal Laws of each State. "The modern world is a world of individuals organised into or under States : it is just as much an international question to what State a man belongs as to

1. G: Starke—An Introduction to International Law (Second Edition) p: 217.

what State a territory belongs. International rights and duties depend constantly on the nationality of individuals. To say that for questions of nationality there is no International Law is to hand over a large mass of international matters to anarchy. But this is not to deny that according to International Law nationality as a general rule is left to be settled by municipal regulations."[1]

Modes of aequistion of Nationality.—Although is it the concern of Municipal Laws of each State to lay down rules for the acquisition of nationality, International Law recognises the following modes in which nationality may be acquired :—

1. **By birth** —Nationality by birth may be acquired either on the principle of *jus soli* whereby mere birth on the soil confers nationality or on the principle of *jus sanguinis* by which the nationality of the parents determines the nationality of their children. It may be acquired on the basis of both the principles, *Jus soli* and *Jus sanguinis.* The practice of the States with regard to acquistion of nationality by birth is not uniform. Some States follow the principle of *Jus soli* and lay down that all persons born on their territory become their nationals while there are other States which adhere to the principle of *Jus Sanguinis* and ordain that children born of their nationals become their nationals. Some States like Great Britain and the United States follow both the principles so that children born on their soil as also children born of their nationals become their subjects.

2. **By naturalization.**—The term 'naturalization' in its narrow sense connotes the idea of acquisition of nationality by an alien in the manner provided by the Municipal Laws of a State. In its wider sense 'naturalization' or acquisition of nationality may be through marriage, legitimation, option, acquisition of domicile appointment as Government official and grant on application.

The term 'naturalization' is applied to the case of an alien.The laws of each State lay down rules for naturalization. The States are free to grant naturalization. on any conditions they like. It is also not necessary that on naturalization the alien may enjoy the same rights as nationals by birth. "Naturalization is an administrative act of the State conferring citizenship upon an alien. But there is a rule of

1, Sir John Fischer Williams, "Denationalization" British Year. Book (1927) 45, 51.

general International Law prohibiting the conferring of citizenship upon an alien without his consent. Hence naturalization is admissible only in case the alien applies for it." [1]

3. By redintegration or resumption — According to the laws of some States an individual who had hitherto been their subject loses his nationality on becoming naturalised abroad. When the nationality by naturalisation is lost, the individual may take back his original nationality. The Municipal Laws may prescribe conditions which are to be satisfied before resumption takes place. The acquisition of original nationality in such a case is by redintegration.

4. By subjugation.—On subjugation the nationals of the subjugated territory acquire nationality of subjugating State.

5. By cession.—Similar to nationality by subjugation is the nationality acquired when the territory is ceded. The nationals of ceded territory assume the nationality of the State to which the territory is ceded.

Loss of nationality.—It is for the Municipal Law of each State to prescribe rules whereunder nationality is lost. International Law, however, recognises the following modes of the loss of nationality :—

(1) **By release.**—The Municipal Laws of some States allow citizens release from their nationality. If the State agrees to release its national from its nationality loss of nationality takes place. Germany permits its national to ask for release from German nationality.

(2) **By deprivation.**—The loss of nationality by deprivation takes place by force of the Municipal Laws of a State. Certain States have enacted that their nationals would lose nationality if they enter into service of another State without the permission of their home State. The deprivation of nationality may be founded on any ground.

(3) **By expiration.**—The loss of nationality may take place on the ground that an individual stayed abroad for a certain length of time. Some States have enacted laws under which the citizen loses nationality if he stays abroad for more than the prescribed period of time.

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1. Hans Kelsen—Principles of International Laws, Page 250.

(4) **By renunciation**.—A citizen may by a declaration cease to be a citizen of a particular State. This renunciation may be necessary when an individual is a national of two States according to their respective laws. In such a case the law allows him to make an election. In making the election the individual has to renounce one of the two nationalities.

(5) **By substitution.**—Certain States have laws which ordain that on naturalisation the original nationality is lost. The loss of nationality in such a case is by substitution.

Double nationality.—The absence of rules of International Law regulating acquisition and loss of nationality and the lack of uniformity in the nationality laws of various States are responsible for cases of double nationality. An individual is said to have a double nationality when he is a national of more than one State according to the Municipal Laws of those States. Double nationality according to Oppenheim may be produced by every mode of acquiring nationality. But birth and naturalization are frequently the causes of double nationality.

Double nationality due to birth may occur in this way: There is a State *A* the Municipal Laws of which provide for acquisition of nationality simply on the ground of birth on the soil of the State irrespective of the nationality of the parents. Another State *B* has laws which lay down that the children of its citizens become its nationals. A person *P* born in State *A* of parents who are nationals of State *B* possesses double nationality inasmuch as he is national of both the States *A* and *B* according to their respective laws. Double nationality by naturalization may take place when an individual who is a national of State *A* does not under the Municipal laws of that State lose nationality even if he acquires nationality of State B by naturalization. Cases are not uncommon where double nationality occurs on marriage, and legitimation.

International Law recognises that States can claim redress of the wrong done to its national while present on the territory of another State and that no redress can be claimed from a State of which the individual wronged is the national. It is therefore clear that in the case of an individual possessing double nationality the two States each of which claims him to be its national cannot claim redress against each other. The

consequences of double nationality have been stated by Oppenheim thus :—

> "Each of the States claiming such an individual as a subject is internationally competent to do this although they cannot claim him against one another since each of them correctly maintains that he is its subject. But against third States each of them appears as his sovereign and it is therefore possible that each of them can exercise its right of protection over him within third States. On the other hand a third State can treat an individual possessing two nationalities as a subject of either of the two States to which he owes allegiance."

Cases of double nationality are difficult as complications arising from conflicting allegiances yield to no easy solution. The Mixed Claims Commission in the case of the *William Mackenzie* Claim (1925) between Germany and the United States of America had to deal with a difficult situation arising of double nationality. The father of the claimant having been born in America of British parents became an American citizen according to the American laws and also a British citizen under the British Nationality Laws. The Commission came to the conclusion that inasmuch as the claimant did not exercise the right of expatriation he remained an American citizen and observed : "Much might be said in favour of adoption by the United States and other nations of a multilateral treaty, supplemented by Municipal legislation, looking to the abolition of dual nationality, or its termination through enforced election under appropriate restrictions."

The Permanent Court of Arbitration in the Canevaro case (1912) wherein Peru as well as Italy claimed Canevaro as their national. Canevaro being born in Peru became Peruvian national and as he was born of an Italian father he became an Italian national. The Court refused to accept the view that neither could exercise diplomatic protection and applied the principle of active as opposed to dormant nationality. It considered the fact that Canevaro lived as an active citizen of Peru by seeking election for the Senate and by accepting the post of Consul General for Netherlands and held that Peru and not Italy was entitled to claim him as its national. This principle of active nationality was also applied in the case of *George S. Heine* v. *Hildesheimer Bank* (1922) wherein Heine who was also a German national was held to be a British citizen entitled to claim through the British Clearing Office.

The difficulty of the situation arising from double nationality of an individual was sought to be removed by the Hague Convention of 1930 on certain questions relating to the conflict of Nationality Laws. This convention with a view to resolve the conflict of jurisdiction in cases of double nationality provided for the following rules :—

(1) If an individual possesses nationality of two or more States it is open to each of the States to claim him as its national.

(2) A State may not exercise its right of protection in respect of its national against another State which also claims that person to be its national.

(3) A third State shall recognise only the effective nationality of an individual possessing double nationality. The effective nationality means either the nationality of the State in which he is habitually and principally resident or the nationality of the State with which he is most closely connected.

(4) A person who possesses double nationality without any voluntary act of his own may renounce one nationality with the permission of the State the nationality of which he desires to renounce.

The difficult situations arising in cases of double nationality clamour for agreement among various States on rules relating to nationality. The Permanent Court of International Justice in its Advisory Opinion on the Acquisition of Polish Nationality (1923) observed that this difficulty of double nationality can be renounced only by international conventions. The United Nations Law Commission has taken up the matter of double nationality and it is expected that it would in due course bring about a Convention for the elimination of cases of double nationality.

Statelessness.—An individual is said to be stateless when he does not possess the nationality of any State. Statelessness may occur when an individual on the loss of his original nationality fails to acquire any other nationality. It may occur even by birth when by the Municipal Laws of the State of his birth he is unable to acquire nationality of that State. A stateless individual cannot get the benefit of the International Law as there is no State which may exercise the right of protection with respect to him. *Oppenheim*

compares the position of stateless individuals to vessels on the open sea not sailing under the flag of a State which do not enjoy any protection.

The Hague Convention of 1930 may be noted in this connection for it aimed at minimising the possibilities of statelessness. The Hague Convention elaborately dealt with the question of nationality of married women and children and provided for mitigation of consequences of statelessness.

Nationality and Domicile.—Domicile and nationality are two different legal conceptions which are to be kept apart from each other. The term 'domicile' connotes a relationship between the individual and the locality where he is deemed under law to have his permanent home. Nationality as we have already seen constitutes a relationship that exists between the individual and the State to which he belongs or owes allegiance. The individual may not have permanent home in the State of which he is a national. Domicile does not depend upon the membership of a State. The law contemplates that every person has a domicile at every period of his life and that no individual has more than one domicile at a particular time. In the case of nationality an individual may have double nationality and may also have no nationality at all.

Nationality of Legal Persons.—The application of the concept of nationality to legal as opposed to physical persons is due to the national solicitude of States for the protection of the interests of the business corporations coming into existence in their territories. The relation between State and the corporations created by it is analogous to that which exists between the State and physical persons. The nationality of corporations is a modern conception and originates in the view that a State by its act of incorporation clothes an artificial person with its nationality and thus becomes responsible for the protection of its interests abroad. The doctrine of 'nationality of claims' which permits a State to lodge a claim in respect of an injury to its national and which requires that the injured person must have the nationality of the claimant State has helped a great deal in clothing juristic persons with nationality. Although strictly speaking the concept of nationality as applied to physical person does not in all respects apply to juristic person for all the privileges conferred by nationality on physical persons cannot be enjoyed by legal persons, the modern practice of imputing a nationality to corporations has rendered it possible for States to safeguard

the business interests of the corporations created within their territories. In international relations it has now been recognised that corporations as well as unincorporated associations have a nationality.

International Law does not prescribe an invariable test for determining nationality of legal persons. The reluctance of International courts and tribunals to apply strictly the concept of nationality to legal persons is responsible for adopting a number of tests for the determination of nationality of legal persons The French-German Mixed Arbitral Tribunal in the case of *Societe Anonyme du Charbounage Frederic Henri* (1921) while enquiring into the enemy character of the company did not rely upon the act of incorporation as the determining factor but proceeded to consider the nationality of the majority of the shareholders. The Tribunal ignored the legal entity and diverted its attention to the individuals behind the artificial person to find out the State to which the legal entity belonged. The Permanent Court of International Justice in the case of the German Interests in *Upper Silesia* (1926) observed: "The Geneva Convention has adopted, as regards the expropriation regime and in so far as companies are concerned, the criterion of control; this however does not prevent other criteria which might be applicable in respect of the nationality of juristic persons from possessing importance in international relations from other standpoints for instance, from the standpoint of the right of protection." The principle of control was again applied by the Permanent Court of International Justice in the case of the *Vereinigte Konigs Und Laurahutte Company*, although the nationality principle was held to be applicable in appropriate cases. The Court had to consider the question of nationality of the University under Hungarian law in the case of the *Peter Pazmony University* (1933) and it expressed the view that the University was a Hungarian national. It would thus appear that the International Courts and tribunals are inclined to look to the individuals behind the legal entity for determining the nationality of legal persons. The practice of States shows that there is no single test for determination of nationality of corporations and unincorporated bodies. The tests in this behalf differ from country to country and a test good in times of peace is abandoned as unacceptable in times of war. "There is not one single test which has been accepted by State practice for all purposes. The position differs from country to country, and different tests are applied in time of peace as compared with a state of war. In peace, there is a tendency to rely on one of the more formal-

tests, whereas during war, in spite of all the uncertainties connected with it, the control principle has found widespread application."[1]

The test of domicile held the field during the period preceding the First World War and it was generally applied in determining the nationality of legal persons. In the case of *Chamberlain* and *Hookham Ltd.* v. *Solar Zahberwerke*, (1922) the Anglo German Mixed Arbitral Tribunal was faced with the question whether a corporation was the national of the country in which it was incorporated or it had the nationality of the individuals who controlled its affairs. The Tribunal observed that the domicile test which was applicable before the war could not be applied and that the nationality of the incorporated body was to be determined by the application of the control test. The domicile test lies in the determination of the nationality of a legal person on the basis of the place of incorporation. According to domicile test a corporate body will have the nationality of the State under whose laws it is created and in whose territory it has its seat. In the *Canevaro* case (1912) the question as to the nationality of a business firm of Jose Canevaro and Sons arose. The Permanent Court of Arbitrtation held that the firm had a Peruvian nationality by reason of the firm having its seat in Peru and also of the Peruvian nationality of its members. The Claims Commission in the case of *Ruden and Co.* (1870) between Peru and the United States of America applied the domicile test and took into consideration the place of incorporation as the determining factor. The test of incorporation was also applied by the Claims Commission in the case of the *Madera Co. Ltd.* between Great Britain and Mexico. The Belgian-German Mixed Arbitral Tribunal in the case of *La Swedoise Grammont* v. *Roller* (1923) held that the company had the nationality of the place of business.

During the First World War the position changed and the domicile test yielded to the control test which was adopted by Great Britain and other Allied powers. The control test was also applied to claims after the war. The Anglo-German Mixed Arbitral Tribunal in *Weiss Biheller and Brooks Ltd* (1922) the nationality of the individuals who controlled the business was held to be the determining factor. The permanent Court of International Justice in the case of German interests in *Polish Upper Silesia* (1926) defined the control test and laid down that control of a corporate body lay in the exercise of a prepon-

1. George Schwarzenberger : International Law p. 164.

derent influence over the general policy of the corporation. The Geneva Convention adopted the control test, that is to say, the principle that the corporate body has the nationality of the individuals who exercise control over that body. The application of this test necessitates an enquiry into the question as to what constitutes control of the corporate or unincorporated body. The answer to that question will depend on the particular facts of a case. In an inquiry for determination of the nationality of a legal person on the ground of the nationality of the individual or individuals having control over the corporate body it will be necessary to find out the place of incorporation, the nature of the business enterprise, the source of investment, the place of the business of the company and the individuals who are responsible for the general policy of the company. The Permanent Court of International Justice in the case of the *Giesche Co.* took in consideration the nationality of the general manager of the company, the nationality of the majority of the members of the board of control and of the shareholders and held that the company was a German national. In the case of the *Vereinigte Koenigs Und Laurahutte, Co.* the Court laid emphasis on the nationality of the majority of the shareholders for according to its view the general meeting of the shareholders exercised the supreme power over the company and that the authority of the Board of Control emanated from the general meeting of the shareholders. The court argued that although the four-persons of non-German nationality who held four fifth shares of the company were in minority in the Board of Control, they formed the majority in the general meeting of the shareholders and exercised the supreme power. It observed: "From the general meeting which is the constituent body, directly emanate the powers of the Board, and directly or indirectly, those of the management. It is a well known fact that the acquisition of the majority of the shares is precisely the means by which an interested person or group of persons may seek to obtain control over a concern." The control test was also applied by the House of Lords in the well known case of *Daimler Campany* v. *Continental Tyre and Rubber Company*[1] where it was held that a company though incorporated in the United Kingdom may be treated as having enemy character if the persons in *defacto* control of the company resided in the enemy country and acted under instructions of the shareholders of enemy country.

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1. (1916) 2 A. C. 307.

Thus it would appear that the general rule that an incorporated body has the nationality of the State under whose laws it receives incorporation and that an unincorporated association has the nationality of the State in which it has been formed or in which its board of control is located does not usually apply when the question as to whether a corporate body or an unincorporated association has an enemy character arises. The general rule stated above is usually applied in time of peace but in a state of war the control test is generally preferred.

In case of partnerships the general rule is that it is the nationality of the partners that counts. In the case of *Ruden and Co.* (1870) it was held that a firm was incapable of having a nationality. The nationality of the majority of partners will be the nationality of the firm. The place of the business of the firm will not be a determining factor. Thus, the British German Mixed Claims Arbitral Tribunal in the case of *Hyman* v. *Wydra* (1921) held that although the firm was established in German territory it did not belong to Germany as none of its partners was a German national.

Nationality of Ships.—The nationality of a ship is determined by the flag it carries unless the ship's papers disclose otherwise. A State has the right to allow a ship to fly its flag and if a ship sails under its flag, it has the nationality of the flag State The Greco-Bulgarian Mixed Arbitral Tribunal in the case of the *Katrantsios* (1926) held that the flag determines the nationality of the ship unless that ship's registers show otherwise. A State by allowing a ship to sail under its flag makes it its national. As a general rule the flag constitutes conclusive evidence of the ship's national status and the International Courts and Tribunals are not entitled to enquire into the ownership of the ship in cases where the ship's papers support the flag carried by it. This rule has not been followed in some cases. The case of I,m Alone (1933, 1935) is an interesting illustration of the non-observance of the general rule. The Commission in this case did not rely upon the British flag which I,m Alone carried but proceeded to enquire into the beneficial or ultimate ownership of the ship. They held in their Final Report: "We find as a fact that from September, 1928, down to the date when she was such, the I,m Alone, although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons

acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned. The possibility that one of the group may not have been of United States nationality we regard as of no importance in the circumstances of the case."[1]

Nationality of the air-craft.—The nationality of the aircraft has assumed an importance in modern times. The Convention relating to the Regulation of Aerial Navigation of 1919 to which a number of States including Great Britain are parties requires an aircraft to be registered in one State only. According to this Convention the aircraft has the nationality of the State in which it is registered. The State registering the aircraft has to prescribe the conditions to be fulfilled by the aircraft taking registration. The Chicago Convention on the International Civil Aviation of 1944 is similar in effect. In June 1948 the International Civil Aviation Organisation arrived at a Convention on International Recognition of rights in Aircraft. This Convention provides for the change of nationality of aircraft and introduces the system of recognition of rights in aircraft.

Nationality in India.—Unlike the United States where there is dual citizenship, that is to say, federal as well as State citizenship India has adoped the principle of single citizenship. Article 5 of the Indian Constitution provides that every person who has his domicile in the territory of India and who was born in the territory of India or either of whose parents was born in the territory of India or who has been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution shall be a citizen of India. The Constitution further provides that a person who has migrated to Pakistan will be a citizen of India at the commencement of the Constitution if :—

(*a*) he or his parents or any of his grandparents was born in India as defined in the Government of India Act, 1935 (as originally enacted) ; and

(*b*) (*i*) in the case where such person has so migrated before nineteenth day of July 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

1. (1933 : 1935) 3 Reports of International Arbitral Awards Page 1609.

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the from and manner prescribed by that Government :

Provided that no person shall be so registered unless be has been resident in the territory of India for at least six months immediately preceding the date of his application.

Art. 7 of the Indian Constitution provides that a person who migrated to Pakistan after 1st March, 1947, shall not be deemed to be a citizen of India. The Constitution in Art. 9 provides that no person who has voluntarily acquired citizenship of any foreign State shall be deemed to be citizen of India. The Constitution lays down that the Parliament will have the power to make any law with respect to acquisition and termination of citizenship and all other matters relating to citizenship.

The Indian Citizenship Act (1956)—The Indian Constitution does not make any provision for the acquisition of citizenship after its commencement or the termination of citizenship. The Citizenship Act of 1956 deals with all the matters connected with citizenship It provides for acquisition of citizenship by birth, descent, registration, naturalisation and incorporation of territory. How the citizenship terminates is described in sections 8, 9 and 10 of the Act. There is a provision for Commonwealth citizenship. Every person who is a citizen of a Commonwealth country will be deemed to have commonwealth citizenship. The Indian Government has a right to make provisions on the basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the Commonwealth citizens.

CHAPTER XX

PLACE OF THE INDIVIDUAL IN INTERNATIONAL LAW

Individuals in International Law.—In the earlier chapter the conclusion was reached that the individual cannot

be regarded merely as an object but that it was the real subject of International Law. It was stated that in the matter of procedural law the States but in the matter of substantive law the individual were the real subjects. A fuller discussion on this topic is essential because the conclusion reached is contrary to the very definition of International Law given in the beginning of this book. International Law embodies rules regulating the mutual conduct of States and the conclusion that human beings are subjects of obligations, responsibilities and rights established by International Law need not surprise a student of law who is keen enough to analyse the position.

There is a sharp controversy as to the right position of an individual in the scheme of modern International Law and it would be interesting to note the views of great writers on the subject.

Oppenheim.—Held the view that individual human beings were not subjects of International Law. He maintained that States alone were subjects of International Law. He observed: "As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, such as a King or an ambassador for example, is not directly a subject of International Law. Therefore, all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not, as a rule, international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the State concerned by International Law Likewise, all duties which might necessarily have to be imposed upon individual human beings according to the Law of Nations are, on this view, not international duties but duties imposed by Municipal Law in accordance with a right granted to, or a duty imposed upon, the State concerned by International Law"[1]. This view was expressed in his famous book on International Law in its first three editions.

Lauterpacht.—who revised Oppenheim's book on International Law does not however share the view held by Oppenheim. In the seventh edition of that book he observes: "While it is of importance to bear in mind that primarily States are subjects of International Law, it is essential to recognise the limitations of that principle. Its correct meaning is that States only create International Law, that international law is prima-

1. Oppenheim,—International Law, vol. I, p. 19.

rily concerned with the rights and duties of States and not with those of other persons ; and that States only possess full procedural capacity before international tribunals. Further than this that principle does not go. In particular, when we say that International Law regulates the conduct of States we must not forget that the conduct actually regulated is the conduct of human beings acting as the organ of the State".

In his book 'International Law and Human Rights', Lauterpacht observes: "The claim of the State to unqualified exclusiveness in the field of international relations was tolerable at a time when the actuality and the inter-dependence of the interests of the individual cutting across national frontiers were less obvious than they are to-day ......What is much more important, the recognition of the individual, by dint of the acknowledgment of his fundamental rights and freedoms as the ultimate subject of International Law, as a challenge to the doctrine which in reserving that quality exclusively to the State tends to a personification of the States being distinct from the individuals who compose it with all that such personification implies. That recognition brings to mind the fact that in the International as in the Municipal sphere the collective good is conditioned by the good of the individual human beings who comprise that collectively".

Westlake.—While emphasizing that States were primarily subjects of International Law did not overlook the importance of individual human beings in the scheme of international affairs. He observed : "Where International Law allows a State to have direct relations with a private person nor its own subject, it is only by virtue of a rule prevailing between States that this is so...........These considerations furnish the answer to the question which is sometimes asked, whether private persons can be the subject of International Law, but it is only by virtue of rules prevailing between States that they are so."[1] Speaking of the importance of the individuals in International Law he stated thus : "The duties and rights of States are only the duties and rights of the men who compose them."[2]

Sir Frederick Smith, is emphatic when he says "States and States alone enjoy a *locus standi* in the law of nations ; they are the only wearers of international personality."[3]

1. Chapters on the Principles of International Law, p. 1—2.
2. Collected papers p. 78.
3. A manual of International Law by George Schwarzenberger p. 57.

E. C. Stowell, maintains that an individual is the subject of International Law both in his capacity of a human being and as being a component part of his State. He observes: "Fundamentally the law of nations is a law of individuals, enforced through the agency of the government of the communities into which mankind is apportioned......There is, therefore, a certain justification in recognising that States share with individuals character of subjects of International Law"

Heffter, asserts that the fundamental rights inherent in human beings entitles individual to be "immediate subjects of International Law."

P. M. Brown, protests against the traditional view that States alone are subjects of International Law and observes: "The most serious error committed by the defenders of International Law has been founded in their parrot-like re-affirmation that it applies only between sovereign States."

Schwarzenberger observes: "it may be considered paradoxical that the individual, the basis both of national communities and of international society, should be merely an object of International Law. Yet as long as the groups which, until now, hold the monopoly of admitting additional subjects to the realm of international law chose to maintain this state of affairs, this situation is bound to continue. It is mitigated in fact by the diplomatic protection of nationals abroad by their home states, and by multitude of treaties, like commercial or minorities treaties, which must directly concern individuals."

Fenwick, after dealing with the view of various writers sums up his conclusion thus: "In presence of these facts it would seem unreal to say that individuals are not in some degree subjects of International Law, at least in respect to the rules of substantive Law. In respect to procedural law while the individual must in general look to his State for enforcement of his rights, there is the precedent of the minorities treaties conceived after the First World War to mark the tendency to create international machinery for the protection of fundamental rights."

Russian View.—The attitude of U. S. S. R. in regard to the place of individual in International Law has been one of professed antagonism. *Mr. V. M. Koretsky* of Russia in his capacity as jurist in the United Nations International Law Commission unequivocally declared that he did not agree

with the concept of individuals as 'subject of International Law'. It is because communism starts with the negation of individualism. Such a provision in International Law will not only allow them to perpetuate their totalitarianism hence this opposition.

International Law as applicable to individual.—Those who maintain that State alone are subjects of International Law and that International Law creates no rights for and imposes no duties, on individuals ignore the practical side of International. Law. Apart from the fact that the international community has now come to realise that the welfare of the individual human being is essential for international peace and security, many provisions of International Law have no direct reference to States as such and are directly addressed to individuals. Recently the fundamental human rights have received such a recognition that it would be incorrect to say that individuals are simply objects of International Law. In its practical application International Law in various ways directly regulates the conduct of an individual in the same way as the national law. Some of the provisions of International Law directly concerned with individuals are :—

1. **Piracy.**—International Law prohibits piracy and imposes an obligation on all States to seize pirates on the high seas and to punish them. It provides for a sanction directed against the individual who commits piracy. In other words, an obligation is imposed on individuals to refrain from committing acts of piracy. It is not the State of which the pirate is a national but the pirate himself that is punished and is made responsible for the wrong.

2. **Abuse of flag.**—International Law requires ships to sail under the flag of a State and imposes an obligation on a State having a maritime flag to lay down conditions to be fulfilled by vessels which are to sail under its flag. Further, another universally recognised rule of International Law is that men-of war of every State may seize and bring to port of their own for punishment any foreign vessel sailing under its flag without authority. These rules of International Law in effect prohibit the owner and master of the ship making an illegitimate use of the flag and do not concern the State to which the ship belongs.

3. **Injurious acts of individuals.**—There are numerous rules of Internat ona Law which require States to punish individuals guilty o' committing acts injurious to foreign states.

For example, heads of states and diplomatic envoys while in a foreign state enjoy special protection of their persons and International Law requires that an individual who commits any violence against their persons must be severely punished. *In Respublica v. De Longchamps*, which was a case in which an individual was accused of assaulting the Consul-General of France McKean, Chief Justice of Pennsylvania observed :—

> "Whoever offers any violence to him, not only affronts the sovereign he represents but also hurts the common safety and well-being of nations, he is guilty of a crime against the whole world......you then have been guilty of an atrocious violation of the law of nations."

It may be noted that members of Government in their private life are as much responsible for internationally injurious acts as other persons. International law imposes an obligation upon every state to prevent within means at its disposal its own subjects and such foreign subjects as stay within its territory from committing injurious acts against other states. Further, it requires every state to punish the individuals guilty of internationally injurious acts and also to compel them to pay damages where necessary. Rules of this nature regulate the conduct of the individual.

4. **Aliens**.—International Law concedes rights to, and imposes obligations upon, individuals, present on the territory of a foreign state. Every State is compelled to grant to aliens equality before the law with its citizens so far as safety of person and property is cocerned. An alien is under the jurisdiction of the State in the territory of which he is present and is responsible to it for all acts committed by him there.

An alien enjoys special privileges in International Law. In his position as a national of a foreign country his interests are protected with the result that the State of which he is the national has a right to interpose on his behalf for the protection of his rights and to claim reparations for the wrong done to him. International Law prescribes a standard for the treatment of an alien and a duty is cast upon States to provide for the minimum standard of such treatment. The rules of International Law relating to the treatment of aliens are directly applicable to individuals although the States alone are entitled to enforce them.

5. **War Crimes and acts of illegitimate war-fare.**—According to *Oppenheim* the entire law of war is based on the

assumption that its commands are binding not only upon states but also upon their nationals whether members of armed forces or not. This principle guided the powers in arriving at the Agreement of August 8, 1945 for the punishment of Major War Criminals of the European Axis on the basis of individual responsibility for war crimes. On the objection that individuals could not be held responsible, the Nuremberg International Tribunal observed that, "crimes against International Law were committed by men and not by abstract entities and that the provisions of International Law court be enforced only by punishing individuals who committed such crimes."

International Law imposes an obligation on the States to punish their own war criminals and allows belligerents to punish the prisoners of war having violated laws of war before being captured. This rule of International Law prohibits individuals to commit acts in violation of laws of war. Individuals not belonging to the armed forces of a belligerent are not, by International Law, allowed to take up arms against the enemy. In case they take up arms against the enemy, they commit an offence under International Law and render themselves personally liable.

6. **Nuremberg and Tokyo trials of Individuals**—The several hundred trials of individuals held after the second world war established the principle that individuals are accountable for violations of International Law. The Nuremberg and Tokyo trials are the most notable for the exposition of law. The Inter-Allied Conference of 1942 held in London reached an agreement to "place among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them, or participated in them." The foundations of the Nuremberg trial were laid in 1943 when Russia, the United States of America and the United Kingdom issued at the Moscow Conference of Foreign Ministers a joint declaration to the effect that "German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished." The second world war brought about a change in juristic thought as to the liability of individuals for war crimes. The nations arrayed against Nazi aggression were under a belief that the Government and Military officers were

responsible for the war and the atrocities committed during war. This belief found expression at the United Nations war Crimes Commission set up at London in 1943. The Commission recommended the establishment of 'War Crimes Office' in every State for the investigation of offences against citizens. The individuals behind the States appeared to be responsible for the war and for all the misdeeds, committed in violation of the laws and customs of war.

The Nuremberg Trial was held on the authority of Charter signed at London by the representatives of the United States of America, the Soviet Russia, Britain and France whereby an International Military Tribunal for trial of Nazi leaders was set up. To this Charter was attached an Agreement providing for the trial of the major war criminals of the European Axis whose offences had no particular geographical location. The Charter gave the Tribunal the authority to try crimes against peace; war crimes, crimes against humanity and the Common Plan or Conspiracy. "The Charter made it quite clear that the official position of any defendant, however exalted, would not absolve him from responsibility or mitigate punishment, while it was expressly stated that superior orders would not constitute a defence, but might be considered in mitigation of punishment." The Signatory Powers created the Tribunal and specified the law which the Tribunal had to administer. The establishment of the Tribunal was in the exercise of the sovereign power of the countries to which the German Reich unconditionally surrendered. The victors based their case on the rule of International Law which authorized them to legislate for the occupied territories. The responsibilities of the twenty-two German and Nazi leaders who figured as accused at the trial were fully discussed by the Tribunal. Twelve of the accused were sentenced to death ; three received life imprisonment and four were committed to prison for long terms of years, only three accused were acquitted.

The Tokyo Trial was held by the International military Tribunal which was set up by a Charter. Twentyeight individuals were accused of Conventional War Crimes (*i.e.* murder, and conspiracy to permit murder, of prisoners and civilians), crimes against peace and crimes against humanity. The provisions in this Charter were similar to those of the Charter in respect of the Noremberg trial.

These trials were not merely of low-rank officials but of Cabinet Ministers, Premiers, Ambassadors, Generals and other high

officials. The tradistional view that responsible high Government officials could not he tried stood repudiated. Similarly, the view that subordinate officials acting under the orders of their superiors were not liable was rejected. These trials introduced three important principles in International Law. They held high responsible Government officials as much guilty as the inferior officials; they rejected the plea of superior orders in justification of the acts of the subordinate officials and they laid down the rule that the planning and waging of an aggressive war constituted an individual crime. According to Stimson the man who makes or plans to make aggressive war is a criminal. These trials undoubtedly succeeded in fixing individual responsibility for war-mongering as an international crime. The individual came in for much criticism in the second world war and was held responsible for what he did in making war. The principle is now established that high responsible officials of a State cannot escape liability for violation of the laws and customs of war, in case their State wages war against another State.

7. **Breach of blockade and carriage of contraband.**—The rules of International Law authorize belligerents to capture neutral vessels committing breach of the blockade or carrying contraband and to confiscate them through decision of their prize courts. The owners and masters of neutral vessels are under an obligation to refrain from committing a breach of blockade or from carrying contraband These rules directly concern the individual and do not affect neutral States.

8. **Espionage.**—International Law authorizes a State to punish a spy even if he committed the crime of espionage at the command of the enemy State. The State which employs spies and at whose command the act of espionage is committed is not responsible under International Law. The individual who commits the act of espionage is to be punished by the State against which the delict of espionage is committed.

9. **International Convention for the Protection of Submarine Telegraph Cables.**—This Convention was signed on March 14, 1884 by Great Britain and twenty-five other States for the purpose of regulating the protection of Submarine Cables The Convention punishes the individual who wilfully or through culpable negligence breaks or injures a submarine cable. The individual who acts in violation of the provisions of the Convention is liable to be punished and is also liable for damages.

10. The Treaty of Versailles.—This is one of those treaties which confer rights on individuals also. Article 297 of the Treaty of Versailles permitted a private individual to bring an action against Germany before Mixed Arbitral Tribunals constituted under Article 304 of the Treaty for recovery of damages suffered by him on account of the extra-ordinary War measures taken by Germany during First World War. The Arbitral Tribunal was also authorised to try cases arising out of disputes in respect of contracts entered into before the Treaty by a citizen of Allied and Associated Powers with German national.

11. The Germano—Polish Convention.—This Convention concerning upper Silesia of 1922 conferred a right on individuals. It authorised a private individual to file a suit against the State before an International Court for violation of interests protected by the Convention.

International Social and Humanitarian Activities.—With the early influence of natural law—a law established not by man but by divine providence and drawing its authority not from consent of States but from the rational nature of human beings and of the high principles of Christianity on the development of International Law the importance of the individual in the international scheme could not be ignored. It would thus appear that since the beginning of International Law as embodying rules for regulating the rights and duties of states interse the well-being of the individual not as a national of a particular State but as a human being has been the concern of nations and international community has been striving in various ways for the promotion of common interests thereby benefitting the individual human being. Though essentially meant for regulating the mutual conduct of States, International Law has come to mean a stabilising force in the protection of the rights of the individual and in the promotion of his welfare in numerous ways. "More effective, however, is the argument that the international community has come to realise more and more of recent years that the welfare of the individual is a matter of concern irrespective of the particular State of which he happens to be a national, and that measures must be taken to improve his condition and to raise his standard of living not immediately in the interest of the State of which he is a national but in his own interest as a human being"[1] A few of the various measures adopted by international commuuity for the promotion of interest of the individual may be noticed :—

1. Fenwick—International Law, page 333.

Slavery and Slave Traffic.—The ancient institution of slavery and the traffic in slaves could heardly escape the attention of thinkers and writers trying to fashion the rules of International Law according to pattern of natural law. Slavery and traffic in slaves came to be denounced by nations having a voice in the affairs of the world. The slave trade was made illegal by many maritime States. Great Britain abolished slave trade in her colonies in 1807 and entered into the Treaty of Paris in 1814 with France to put a stop to slave trade and slavery. The Big Powers in 1815 at the Congress of Vienna declared the slave trade illegal. The United States in 1820 and Great Britain, in 1821 enacted laws making slavery and slave trade a crime like piracy. The Treaty of London of 1841 between Great Britain, Austria, France, Prussia and Russia, the General Act of the Anti-slavery Conference of Brussels of 1890, the Convention of St. Germain of 1919 and the Slavery Convention of 1926 aim at abolishing the institution of slavery and traffic in slaves. The last Convention of 1926 regarded forced labour as bad as slavery and contains an undertaking by the signatories to it to put an end to the practice of employing forced labour.

The Secretary General on the instructions of the Economic and Social Council appointed an ad hoc committee of experts on Slavery to gather information on slavery, slave trade, and forms of servitude akin to slavery and to make a supplementary convention for the purpose eradicating this social evil. It is hoped the measures taken by the United Nations will bring the desired result.

2. **Protection of minorities**.—The territorial adjustment consequent upon the close of the First World War brought the question of protection of interests of minorities into prominence. The Principal Allied and Associated Powers entered into a treaty with Poland, Czechoslovakia, the Serve—Croat—Slovene State, Romania, Greece, Austria, Bulgaria, Hungary and Turkey for the purpose of ensuring just and equitable treatment of their minorities. Albania Esthonia, Latvia, Lithuania and Iraq when joining the League of Nations undertook to safeguard the interests of their minorities. These international engagements providing for protection of minorities were intended to bring about conditions favourable for the progress of the individuals consisting the minorities. The minority clause in the treaties provided for equality before the law, equality of civil and political rights for all nations of whatever race, language or religion, freedom of organisation

for religious and educational purposes and opportunities of elementary education for children in their own language in districts where the minority formed a considerable proportion of the population. The minority clauses were placed under guarantee of the League of Nations. The Council of the League was free to take any action it thought fit, if there was a violation of the minority clause. Any difference of opinion on questions of law or fact arising out of the minority clause between the contracting parties amounted to an international dispute referable to the Permanent Court of International Justice. The League of Nations provided for a special procedure to deal with matters connected with minority clauses.

With all these safeguards the minority treaties failed to achieve the desired result and they broke down. In dealing with the causes of this failure George Schwarzenberger observes: "Three causes may be adduced to explain why the minorities treaties broke out Apart from exceptional cases in which the principle of reciprocity was applied, such obligations were of a unilateral character and resented as such. Therefore States on which such restrictions of their national sovereignty were imposed had a tendency to interpret their treaty obligations restrictively. Furthermore in an age of nationalism the ruling groups in most States demanded assimilation if not absorption of their minorities. They are not usually willing to appreciate the value of toleration and diversity, some of them have also had the experience, which they do not wish to repeat, of their minorities transferring themselves into fifth columns on behalf of ethnically related neighbour States. Finally, the supervisory organs under the minorities treaties were organs of the League of Nations and, like the League Council, closely connected with the failure of the League experiment. Thus, these treaties were considered to form an integral part of the League system and judged as such."[1]

After the establishment of the United Nations the problems connected with the minorities became the concern of the Commission on Human Rights. A sub-commission on the prevention of Discrimination and Protection of minorities has been set up to deal with this matter. The sub-commission made its report proposing several measures which are to be considered by the Commission on Human Rights. There is no doubt that scheme for protection of the interests of minorities will be

1. George Schwarzenberger—A manual of International Law (Third Edition)—pages 50-51.

brought forward and the individuals constituting the minorities will be benefitted.

3. **Public Health.**—Public health constitutes one of those interests which are not controversial in character and which are common to all the States. International Law has in the field of public health, as in other common social and humanitarian interests, brought about co-operative action. Nations anxious to promote common interests adopted a number of multipartite conventions for the purpose of improving the health of the individual as a human being. An international sanitary convention was signed at Venice in 1892. Then followed Cholera and Plague Conventions in 1893, 1894 and 1897. A convention for establishing the International Health Office was adopted at Paris on December on 1907 In 1912 a Convention revising the earlier conventions as well as an International Opium Convention were adopted. In 1924 an agreement for the establishment of an International Office fro dealing with Contagious Diseases of Animals was signed at Paris.

The League of Nations gave due importance to public health and established its own Health Organisation. It appointed a Health Committee composed of representatives of member states. Much good to public health was done by measures adopted by the Health Organisation.

At the San Francisco Conference in 1945 a proposal for the establishment of a specialised agency in the field of public health was made and it took concrete shape when an International Health Conference represented by 61 countries was held to decide upon the constitution of the World Health Organisation which officially came into being in September 1948. The World Health Organisation has 78 members and one associate member, Southern Rhodesia. An attractive programme has been chalked out by the W. H. O. and its various services are available to the world at large. Its more important function is advisory. The W. H. O. is taking an active part in the United Nations programme for the economic development of the under- developed countries.

The World Health Organisation has launched a compaign against malaria, tuberculosis, venereal and contagious diseases. It pays special attention to maternal and child-birth services, sanitation, nutrition, mental health and nursing care. All its activities are directed to improve the health of the individual and to raise the standards of living of millions of people in all parts of the world.

4 **Labourers.**—A labourer is after all a human being and his well-being has been a matter of concern to the international community. Even before the establishment of the International Labour Organisation, their existed a number of Conventions which aimed at amelioration of the condition of the labourer. These conventions made provisions for the recruitment of labourers, the emigration of labourers, for workmen's compensation for accidents and industrial disease and the equalisation and unification of labour laws.

The League of Nations with its programme of securing and maintaining fair and humane conditions of labour and of establishing and maintaining an international organisation for labour helped the creation of an autonomous International Labour Organisation. Although the International Labour Organisation was associated with the League its existence was not affected by the dissolution of the League in 1946. The International Labour Organisation entered into an agreement with the United Nations and undertook the responsibility of contributing to the establisment of universal and lasting peace through the promotion of social justice and the amelioration of the conditions of labour. The sole object of this organisation is to ensure social and moral progress of the individual.

The United Nations has been for some years been engaged in surveying the problem of forced labour and in devising ways and means for the abolition of forced labour. The International Labour Organisation in cooperation with the Economic and Social Council took steps early in 1951 to appoint a Committee to study the problem relating to forced labour and make report thereon. On receipt of the report of the Committee the General Assembly as well as the Economic and Social Council condemned the existence of the system of forced labour and asked the various States to examine their laws and administrative practices in the light of the present conditions.

The United Nations also diverted its attention towards the promotion of trade union rights. The International Labour Organisation in 1948 adopted the Convention on Freedom of Association and Protection of the Right to organize. The Economic and Social Council is engaged in upholding and finding ways and means to enforce, trade-union rights. A fact-finding committee was established in 1950 and efforts are being made to persuade States to promote trade-union rights.

The United Nations and the individual.—The Charter of the United Nations expresses the determination of the Peoples of the United Nations "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained, and to promote social progress and better standards of life in larger freedom". One of the four purposes of the United Nations as declared by the Charter is to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian chracter, and in promoting respect for human rights and fundamental freedom for all. One of the organs of the United Nations is the Economic and Social Council which has undertaken to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all. The encouragement of respect for human rights and for fundamental freedoms for all is one of the objectives of the International Trusteeship system.

Although there is no provision in the Charter for the enforcement of the fundamental human rights, it cannot be denied that the Charter imposes a legal duty on the members of the United Nations to respect these fundamental human rights. The mere fact that there has not been established any international tribunal to enforce these rights does not deprive these human rights of their legal character. In as much as the Charter imposes obligation to respect the fundamental human rights it recognises indirectly the fact that the individual is the subject of International Law. Lauterpacht observes: "The Charter of the United Nations is a legal document; its language is the language of law, of International Law. In affirming repeatedly the 'fundamental human rights' of the individual, it must of necessity be deemed to refer to legal rights—to legal rights recognised by International Law and independent of the law of the State. These rights are only imperfectly enforceable, and in so far as the availability of a remedy is the hall-mark of legal right, they are imperfect legal rights."[1]

The United Nations, it appears from the Charter and from the work it has already done, shows anxious care for the

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1. Lauterpacht—An article on 'The Subjects of the Law of Nations' in Law Quarterly Review, Vol. 54. p. 101—102.

well-being of the individual. The various social and humanitarian measures adopted by it have changed the whole outlook so far as an individual is concerned. A survey of the work already done by the United Nations will bring out the fact that social humanitarian and cultural problems have received the best attention of the organs of United Nations :—

1. Rights of Man—The Universal Declaration of Human Rights.—The view that International Law guarantees certain fundamental human rights could not be accepted before the establishment of the United Nations. Although the Institute of International Law in 1929 adopted a Declaration of the International Rights of Man which asserted that it was "the duty of every State to recognise the equal right of every individual to life, liberty and property, and to accord to all within its territory the full and entire protection of this right without distinction as to nationality, sex, race, language or religion," there had been no recognition by International Law of the fundamental rights of mankind. The horrors of the Second World War gave the realisation that international peace and security was not possible in the absence of a scheme designed for the protection of fundamental rights of makind. This idea gained strength by the Atlantic Charter of August 4, 1941 and the Declaration of the United Nations of January 1, 1942 which asserted to win the war in order to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands." Thereafter followed the Charter of the United Nations with the determination 'to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women.

The General Assembly of the United Nations in fulfilment of its objective adopted on December 10, 1948 the Universal Declaration of human Rights. The adoption of this declaration marks the victory of the individual in international affairs. The Preamble of the Declaration states : "The General Assemly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every organ of society, keeping Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and progressive measures, national and international, to secure their universal and effective recognition and observance both among the

peoples of member States themselves and among the peoples of territories under their jurisdiction."

(a) **Provisions of the Declaration.**—The Declaration contains thirty articles which set forth the inalienable rights of man. It asserts that human beings are born free and equal in dignity and rights and that every individual human being is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status. According to it everyone has a right to life, liberty, security of person, to recognition everywhere as a person before the law, to equality before the law and equal protection of the law, to freedom of movement and residence within the borders of each state, to freedom of thought, conscience and religion, to freedom of opinion and expression, to freedom of peaceful assembly and association, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, to rest and leisure, to a standard of living adequate for the health and well-being of himself and of his family, to own property, to education and to participate in the cultural life of his community. The Declaration affirms that no one shall be held in salvery or servitude, no one shall be subjected to torture, to cruel, in-human or degrading treatment or punishment, to arbitrary arrest, detention or exile, to arbitrary interference with his privacy, family, home or correspondence, to attacks upon his honour and reputation and that no one shall be arbitrarily deprived of his nationality. Every man and woman of full age without any limitation due to race, nationality or religion has been granted a right to marry and found a family and they are entitled to equal rights as to marriage during marriage and at its dissolution. The Declaration also lays down that in the exercise of his rights and freedoms everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society.

The Declaration states that a person charged with a penal offence is to be presumed innocent until proved guilty according to law in a public trial in which he has had all the guarantees necessary for his defence. It declares that the penal laws will not have a retrospective effect and that no one shall

be punished for an act which was not a penal offence at the time of the commission of the act.

Article 8 of the Declaration lays down that every one has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law.

The last article deserves to be noticed inasmuch as it states that nothing in this Declaration is to be interpreted as implying any State, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein.

The articles of the Declaration are :

Article 1.—All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.—Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

Article 3.—Eyeryone has the right to life, liberty and the security of person.

Article 4.—No one shall be held in slavery or servitude ; slavery and the slave trade shall be prohibited in all their forms.

Article 5.—No one shall be subjeted to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.—Everyone has the right to recognition everywhere as a person before the law.

Article 7.—All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.—Every one has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law.

Article 9 —No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.—Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.—(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.—No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.—(1) Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.—(1) Everyone has the right to seek and to enjoy in other countries asylum from prosecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non political crimes or from act contrary to the purposes and principles of the United Nations.

Article 15.—(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.—(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural

and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.—(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

Article 18.—Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.—Eeveryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.—(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.

Article 21.—(1) Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.—Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.—(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.—Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.—(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.—(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace (3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.—Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.—Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.—(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition any respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and

freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.—Nothing in this Declaration may be interpreted as implying for any State, group, or person any right to engage in any activity or to performs any act aimed at the destruction of any of the rights and freedoms set forth herein.

(*b*) **Importance of the Declaration.**—The Universal Declaration of Human Rights marks a decisive step towards fulfilment of one of the important purposes of the United Nations. The Declaration performs a two-fold function. Firstly, in its thirty Articles it defines precisely all ths various inalienable rights of mankind. Secondly, it proclaims that the member States of the United Nations recognise that an individual human being possesses all the rights which it defines. The Declaration in effect imposes a limitation on the sovereignty of States by restricting the right of the States to treat the individual, both national and stateless in the manner they like The Declaration offers a guarantee to individuals both at home and a broad in respect of all the rights it enumerates and serves as a strong link between the individual International Law. The recognition of fundamental human rights on the part of the international society has placed the individual in a right place in international sphere and has rendered it possible to make a correct approach to the problems of international peace and security. The Declaration strengthens the conviction that international peace and security cannot be established unless effective measures are taken to improve the condition of the individuals and to raise their standard of living. The Universal Declaration of Human Rights aims at improving the condition of the human beings and enabling them to raise their standard of living. It is in effect a measure taken by the United Nations to ensure that armed forces shall not be used save to common interest and to promote economic and social advancement of all. Its great importance lies in the fact that it has set a new "common standard of achievement for all peoples and all nations." It can be safely stated that the Declaration is the Magna Carta in international sphere and stands out as a prominent landmark in the history of International Law.

(*c*) **Nature of the Declaration—Legal Nature of the Declaration and its binding force.**—The adoption of the Universal Declaration of Human Rights was followed by

numerous comments on its legal nature and its binding force. It was said that the Declaration was neither a treaty nor an international agreement and that it had no binding force on the Member States of the United Nations. Further, it was stated that the Declaration was simply a recommendation of the General Assembly and the Member States were free to ingore it. These objections can fully apply to any resolution of the General Assembly. What will happen if a member of the United Nations were to withdraw its membership? There is nothing in the Charter which prevents a Member from withdrawing from the organisation. The whole structure of the United Nations is based upon the good will of its members and this huge edifice can crumble down if the majority of the member states withdraw from the Organisation. A resolution of the General Assembly expresses the opinion of the majority of the member States of the United Nations on a certain point. That a State is free to ignore it and act in any manner it likes is not open to doubt. There is nothing so far in International Law which can prevent a state from violating the rules of International Law or acting in violation of the provisions of the Charter, although a state acting in such a manner might work out its doom. As has been stated elsewhere in this book International Law is binding upon a state which cannot exist in isolation and which must in order to fulfil its needs exist as a member of the international society.

That there is interdependence of States and there exists community of interests between the States is not open to doubt. It is also clear that promotion of common interests require international co-operation. It is, therefore not possible for any State to ignore the Declaration on the ground that it is not legally binding upon it. It may not amount to a treaty or an international agreement in law but it is a resolution to which all the member States were willing parties. That the resolution is an expression of the views of all the members cannot be denied. Although there is nothing in the Declaration to compel the States to act in conformity with the rights declared in favour of the individual human being, it will not be possible for them to act deliberately in voilation of these rights.

The Declaration without being in strict sense an international agreement or treaty has very great binding force, for no State will like in its own interests to act in violation of it. It has not only a moral force behind it but it is fortified with the force of circumstances of the modern world. Nations have come to realise that the goal of everlasting peace and

security cannot be reached without the adoption of measures conductive to the welfare of the individual. The Declaration makes the way to that goal easier and no State will choose to ignore it.

Even before the adoption of the Declaration by the General Assembly the doctrine of fundamental human rights influenced the practice of States in various ways. In the past interventions on humanitarian grounds had taken place. Oppenheim observes : There is general agreement that, by virtue of its personal and territorial supermacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and prosecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible."[1] It would thus appear that the doctrine of fundamental rights had played its part in international affairs. The principle of fundamental human rights was accepted and expressly recognised in the treaties of peace of 1947 with Bulgaria, Finland, Hungary, Italy and Rumania. These treaties contain an undertaking by these States to guarantee all persons under their jurisdiction human rights and fundamental freedoms. The Declaration is bound to serve as an impetus to the practice and it can safely be stated that the Declaration would be considered binding by the States.

(*d*) **Defects of the Declaration.**—So far as the Declaration aims at recognising the fundamental human rights in international sphere, it cannot be regarded to be defective in any way. The defect lies in the fact that the Declaration does not provide for International Tribunal to which the individual may have access in case his rights are violated by a State. Article 8 of the Declaration provides for a "right to an affective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law". But this Article offers no satisfactory safeguard. There is nothing in the Declaration compelling the member States to take steps to enact laws guaranteeing the fundamental human rights of the Declaration. Moreover, there is no provision as to measures to be taken by the organs of the United Nations in case a State acts in violation of those rights.

1. Oppenheim—International Law (Seventh Edition) p. 279-280.

The above defects are so patent that the United Nations has already taken up the task of drafting a legally binding Convenant on Human Rights. The Commission on Human Rights submitted in 1950 a draft Convenant and draft Articles on measurs of implementation. This report was examined by the Economic and Social Council which referred certain questions to the General Assembly. The details are being carefully worked out and it is hoped that a legally binding Covenant on Human Rights will be in existence shortly.

(*e*) **European Convention for the protection of Human Rights.**—The universal Declaration of Human Rights was followed in 1950 by the European Convention for the protection of Human Rights which was signed by the member States of the Council of Europe. This Convention gives effect to the principle embodied in the Declaration in as-much as the signatories to the Convention undertook to guarantee the fundamental human rights. It unlike the Declaration provides for the establishment of an international tribunal competent to enquire into disputes relating to violations of the Convention. It requires the establishment of Commission on Human Rights to enquire into the complaints relating to the breach of the Convention and to bring about a settlement.

One of the aims expressed in the Statute of the Council of Europe was the maintenance and further realisation of human rights and fundamental freedoms and in fulfilment of this aim this Convention came into existence. The Committee on Legal and Adminisrrative questions to which the matter was referred by the Consultative Assembly of the Council of Europe on the basis of the Universal Declaration of Human Rights set out a list of rights to be guaranteed and it further worked out a scheme for the enforcement of these rights.

The Convention requires the member States to enact laws guaranteeing the human rights and fundamental freedoms. It requires the establishment of the European Commission of Human Rights consisting of representatives of all the member States signing the Convention. These members of the Commission are to be elected from a list prepared by the Consultative Assembly. No two members of the Commission are to be nationals of the same State. The function of the Commission was to enquire into the complaints against the States about violations of the Convention and to bring about a pacific settlement of the disputes arising out of such violation. If no settlement is arrived at the Commission has to make a report

giving its opinion to the Committee of Ministers. The signatories to the Convention are bound by the decision of the majority of two-thirds of the members of the Committee of Ministers.

An European Court of Human Rights is also proposed by the Convention to be set up. The function of this tribunal would be to adjudicate upon matters arising out of violation of the Convention. It will have jurisdiction in respect of States which have accepted its compulsory jurisdiction.

2. **Genocide—Convention on Genocide.**—The crime of genocide consists in killing a group of human beings. The General Assembly unanimously declared genocide to be a crime under International Law by a resolution of December 11, 1946. Thereafter on December 9, 1948 the General Assembly adopted the Convention on genocide. The Convention declares genocide to be crime under International Law whether committed in time of peace or during war. This Convention came into force on January 12, 1951. It is also provided in the Convention that it will cease to be in force when the number of the States adhering to it comes down to less than sixteen. When it came into force 23 States had ratified it.

The Convention lays down that killing members of a group, causing them serious bodily or mental harm deliberately inflicting condition, on the group to bring about their physical destruction, imposing measures to prevent births within the group and forcibly transferring children from it to another group are punishable as genocide. Conspiracy or attempt to commit genocide has also been made punishable. All persons whether they are private individuals or rulers or government officials, guilty of genocide are punishable under the Convention. The Convention requires the adhering States to enact laws to give effect to it and to extradite persons guilty of genocide. It is also provided for in the Convention that the trial for the offence of genocide will be held in the country where genocide was committed.

3. **Status of women.**—The promotion of those interests which are peculiar to women is also a matter of primary concern to the United Nations. A Commission on the status of women was established in 1946 to study the problems connected with the rights of women and to make recommendations. The Commission is constantly engaged in the advancement of women's political rights, economic rights, property

rights, their legal status under family law and nationality law. The General Assembly recommended to all Member States the grant tothe women of political rights equal to those of men. It adopted in 1952 a Convention on the Political rights of women whereby it was agreed that women would have a right of vote in the election of public bodies, to hold public office and perform public functions on the footing of equality with men.

The Economic and Social Council in 1955 adopted a resolution granting women equal rights with men in all branches ef economic life. It also emphasized the need of granting women equal educational opportunities. The Council has recommended that there should be no distinction on the ground of sex to access to education, the basic curriculum and elective subjects. The Commission has made recommendations for equality of parental rights and duties ; for rights of married women to have a legal domicile independently of that of her husband, for the right of married women to engage in work without husband's authorization and for statutory matrimonial property regimes affording women equal rights with respect to separate or family property during marriage and equal sharing of property at dissolution.

The Economic and Social Council has recommended that women should have the same rights as men in retaining their nationality on marriage. The Commission prepared a draft Convention on nationality rights of married women.

4. **Social services.**—The United Nations has set up an ambitious programme in respect of social welfare. Such a programme includes the raising of living standard, international action in family and child welfare, welfare of the aged, the rehabilitation of the handicapped, the prevention of crime and the treatment of offenders and the eradication of juvenile delinquency.

Dignity and worth of the human person.—The Charters of the United Nations in its preamble gives expression to the determination of the peoples of the United Nations to uphold the dignity and worth of the human person. The sanctity of the individual in international sphere has been amply recognised by the Charter. At the open session of the San Francisco Conference,President Truman exhorted nations to "build a new world—one in which the external dignity of man is respected."It was fully recognised during the second world war that no programme for the maintenance of international peace

and security was complete and useful without a scheme for the better rights of the individuals. It was realized that it was necessary to create an international order in which all human beings have the right to achieve their material well-being and spiritual advancement in an atmosphere of freedom and dignity, of economic security and equal opportunity. Even before the San Francisco Conference President Roosevelt in his address to the Congress in 1941 laid emphasis on four human freedoms; *viz.*, freedom of speech and expression, freedom of worship, freedom from want and freedom from fear. The Atlantic Charter of 1941 reaffirmed these freedoms and declared that "they hope to see established a peace which...... ...will afford assurance that all men in all the lands may live out their lives in freedom from fear and want."The United Nation' Declaration of twenty-six nations in Washington on January 1,1942 declared that "complete victory over their enemies is essential to defend life, liberty, independence, and religious freedom and to preserve human rights and justice." These declarations, it may be noted, were expressive of a genuine belief in the eternal dignity of human person and in the fact that everlasting peace lay in the protection of the human rights. They also indicate the important change in the way of thinking. The Dumbarton Oaks Conversations in 1944 between the Four Big Powers dealt with socio-economic aspects of world peace and the necessity of devising a machinery for the protection and promotion of human interests. The Yalta Conference of 1945 with its declaration on Liberated Europe laid emphasis on human rights and fundamental freedoms and on the importance of the individual in international order.

The discussions resulting in the framing of the Charter of the United Nations centered round the individual. It was declared that the Charter would bring in existence a better and freer world for the future. President Truman commented: "The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere—without regard to race, language or religion—we cannot have permanent peace and security." The Charter aims at achieving "international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" ; it authorizes the General Assembly to initiate studies and make recommendations for the purpose of assisting in the realization of human rights and fundamental freedoms; it declares that the United Nations shall promote "universal respect for,

and observance of, human rights and fundamental reedoms for all and declares that all the members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of these purposes. The Charter, it will appear, lays emphasis on the promotion and encouragement of respect for human rights and fundamental freedoms. It has the effect of restoring the individual to its right place in the international order and marks the transition of the individual from an object to a subject of International Law.

CHAPTER XXI

INTERVENTION

Meaning of Intervention.—Independence both externa and internal is the recognised quality of statehood. Both in its internal as well as external affairs a State has inherent liberty of action. International Law protects this inherent right of States and has formulated a rule that every State has a right to ask any other State to abstain from violating its inherent right of independence. Although a State may by its own conscious act curtail its independence no other State has a right to impair its independence by force. International Law imposes an obligation on every State to abstain from encroaching upon the independence of any other State. The other well-recognised right of a State is the right of self-preservation. A State has a right to exist and do all acts necessary for its preservation. International Law excuses even an act of violence if done in the interests of self-preservation. States like individuals have a right of self-defence and in the exercise of this right of self-defence a State is justified in committing acts of violence upon another State. "Intervention is thus not so much a right as the sanction of the rights of States. It constitutes for a State a means of assuring the fulfilment by other States of the duties which they owe to it."[1]

The law relating to intervention, as it at present exists, aims at resolving the conflict between the two principles of Interna-

1. Fauchille, Droit international Vol. I p. 562.

tional Law, *viz.*, the right of self-defence of the intervening State and the right of self-preservation of the State subjected to intervention. Intervention as a measure of self-help, subject to certain well recognised exceptions, is forbidden by International Law. It is a means of self-help and may broadly be stated to mean an interference by force or threat of force on the part of one or more States collectively in the external or internal independence of another State. Briefly put, it is an attack by one State upon the independence of another State in the exercise of its right of self-defence. When a State finds that its neighbour State is managing its affairs in such a way as are detrimental to its existence or a menace to its peaceful existence, it has either to make war upon its neighbour and thereby put an end to the undesirable conditions or to coerce the neighbour to alter the existing state of things. The latter course which has the effect of impairing the independence of the neighbour State will amount to intervention. There is always an element of force or threat of force in such intervention. It is a hostile act and may be distinguished from mediation, intercession or other peaceful diplomatic action. According to *Hall* intervention takes place "when a State interferes in the relations of two other States without the consent of both or either of them or when it interferes in the domestic affairs of another State irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it."

Definitions.—Well-known writers have expressed themselves on the meaning and scope of the term 'intervention' thus :—

Oppenhiem.—"Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual conditions of things. Such intervention can take place by right or without right but it always concerns the external independence or the territorial or personal supremacy of the State concerned, ...But it must be emphasized that intervention proper is always dictatorial interference not interference pure and simple. Therefore intervention must neither be confused with good offices, nor with mediation nor with intercession nor with cooperation because none of these imply a dictatorial interference."

Kelsen.—"The 'intervention' prohibited by International Law is usually defined as dictatorial interference by a State in the affairs of another State. A 'dictatorial' interference is an interference by threat or use of force .... It is evident that general International Law does not prohibit intervention under all circumstances : forcible interference in the sphere of interests of another State is permitted as reaction against a violation of International Law."

Alf Ross.—"Intervention means the dictatorial interference of a State in the internal or external affairs of another State. Merely friendly advice or general political influence do not therefore come under this term which implies that the interference should take place by the use of violence or—at least—a threat to use violence."

Starke.—"International Law generally forbids such intervention which in this particular connection means something more than mere interference and much stronger than mediation or diplomatic suggestion. To fall within the terms of the prohibition it must be dictatorial interference in opposition to the will of the particular State affected and almost always as *Hyde* points out serving by design or implication to impair the political independence of that State. Anything which falls short of this is strictly speaking not intervention and is not forbidden by International Law."

Kinds of Intervention.—It is dictatorial intervention which is subject to certain exceptions, forbidden by International Law. It is with such intervention that we are concerned here. Such an intervention should be clearly distinguished from other acts of interference in the independence of a State for which the term 'intervention' is popularly used. According to *Fenwick* the term intervention in its popular use includes: (1) the interference of third State in a war between two States, (2) the interference of foreign governments between parties to a civil war and (3) the interference of one government in the domestic or foreign affairs of another. Prof. *Winfield* refers to three kinds of interventions :—

(I) **Internal Intervention**.—This is intervention by a

State in a Civil War going on within the territory of another State. The intervening State in such a case, may side with the insurgents or the legitimate government. The intervention of a number of States in the Civil War in Spain in 1936 was typical of internal intervention.

(2) **External Intervention**.—It is an intervention by a State in the foreign affairs of other State. As a general rule, an external intervention is directed against hostile relations of other States. While there is a war going on between two States, a third State can make an external intervention by entering the war on behalf of either of the two States.

(3) '**Punitive' intervention.**—It is resorted to by a State when it has suffered an injury by some action of another State and may be stated as act of retaliation against the State. The punitive intervention may take the form of a pacific blockade.

Grounds of Intervention as of Right.—While generally forbidding intervention, International Law recognises certain circumstances giving a right of intervention to States. It also recognises certain other circumstances which do not give rise to any right of intervention but which are regarded as affording a justification for dictatorial interference. An intervention taking place by right is not regarded by law as any violation of the independence of the State subjected to intervention. In the case of intervention by tight the State interfered with has no right to complain because by the rules of International Law its independence is subject to the right of intervention of foreign States. According to *Oppenheim* intervention by right is present in the following cases :—

(1) A State which holds a protectorate has a right to intervene in all external affairs of the protected State.

(2) If an external affair of a State is at the same time by right an affair of another State, the latter has a right to intervene in case the former deals with affair unilaterally.

(3) If a State which is restricted by an international treaty in its external independence or its territorial or personal supremacy does not comply with the restrictions imposed by the treaty, the

other party or parties to the treaty have a right to intervene.

(4) If a State in time of peace or war violates such rules of the law of nations as are universally recognised by custom or are laid down in law-making treaties other States have a right to intervene and to make the delinquent obey the rules concerned. If, for instance, a State extends its jurisdiction over the merchant-men of another State on the high seas, not only the State of vessel, but all other States would have a right to intervene because the freedom of the open sea is a universally recognised principle.

(5) When a State has by a treaty guaranteed a certain form of government or reign of a certain dynasty for another State, it has a right to intervene in case there occurs a change in the form of government or in the dynasty of another State.

It may, however, be noted that this right of intervention is not generally recognised. *Hall* denies the existence of such a right.

(6) A State in the exercise of its personal supremacy can intervene in the affairs of another State for the purpose of protecting the rights and interests and the personal safety of its citizens present or resident within the territory of that another State.

(7) Collective intervention under the provisions of the Charter of the United Nations for the purpose of restraining States from disturbing the peace of the world.

Recently the United Nations intervened in the dispute between North Korea and South Korea. In 1950 North Korea declared war on South Korea. The Security Council of the United Nations adopted a resolution for the purpose of taking punitive action against North Korea. In pursuance of this resolution the United Nations army contributed by the Members landed in South Korea and drove the North Korean army beyond the 38th Parallel on to the border of Manchuria. Thereupon China intervened on the ground that the presence of the United Nations army near its borders was detrimental to its interests.

Prof. Brierly on Intervention.—According to *Brierly* the law of intervention is intimately connected with the liberty of States to go to war; and so long as the possibility of war among nations is not excluded under the law, there can be no agreement on the principles that are to regulate the practice as to intervention by one State in the affairs of the other. The independence of States demands that there should be no intervention and the cases where law allows intervention must furnish exceptions to the rule of non-intervention. "But it will be difficult to limit interventions in practice to those for which a legal justification can be pleaded, until it is also possible for the law to restrain some of the anti-social uses which States at present are free to make of their independence" *Brierly* thinks that illegal interventions have some times a moral basis and that intervention on humanitarian gronuds unless it is founded on some treaty agreement has no legal justification. He admits that intervention taking place under a treaty as well as intervention directed against a State which is guilty of international wrong are legal and all other kinds of interventions are not strictly justified. He agrees with *Fauchille* who observes : "Intervention is thus not so much a right, as the sanction of the rights of States. It constitutes for a State a means of assuring the fulfilment by other States of the duties which they owe to it."

Brierly is of the opinion that intervention by many States acting together stands on the same footing as the intervention by a single State. According to him the intervention of the great powers before the establishment of the League of Nations was legally improper and the provision in the Covenant of the League about intervention was equally unjustified in law, though such interventions were calculated to prevent war. The Charter of the United Nations directs that the Organisation will try to 'ensure that States which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.' The United Nations are however not authorised to intervene in matters which are essentially within the domestic jurisdiction of any State.

He states his conclusion thus : The strictly legal occasion of an intervention may conveniently be brought under three heads, self defence, reprisals, and the exercise of a treaty right. The two former require detailed consideration, but it will suffice to give one illustration of the last. By the Treaty of Havana of 1903 Cuba agreed that the United States might

intervene for the preservation of Cuban independence, the maintenance of a Government adequate for the protection of life, property , and individual liberty, and in certain other events. This right was exercised on more than one occasion by the United States, but in 1934 it was abrogated by a new treaty."[1]

Other legitimate interventions.—International Law recognises some more interventions for which no State has a right but which are nevertheless justified. Such interventions are :—

1. Intervention for self-preservation and self-defence.—A State in its interests of self-preservation may find it necessary to intervene in the external or internal affairs of another State. The State subjected so such an intervention has no duty to submit and may repel it. Interventions for self-preservation or self-defence are excused by International Law only when they are absolutely necessary for averting the danger It is for the State to judge for itself whether a case of necessity in self-defence has arisen. In order that a State may justify its intervention on the ground of self-preservation or self-defence it must be shown that an injury of the gravest character was threatened, that the State intervened was not itself able to avert the danger and that nothing was done in excess of the requirements of self-preservation. Webster's Statement in the case of the *Coroline* that the necessity to justify action in the self-defence should be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation," contains the correct rule of law.[2] This case arose out of the action of the Canadian Government in capturing and destroying a boat, Caroline through its armed forces which it had sent to the American territory for the purpose of averting danger at the hands of the insurgents which were getting their supplies from the American territory. The American Government protested strongly against such an action and the British Government pleaded imperative necessity to justify the course they took. The British Government maintained :—

(1) "that there was no choice of means for the reason that the American Government had already shown itself powerless in the matter ;

1. Brierly : Law of Nations p. 287-288.

2. Pitt Cobbet—Cases on International Law Vol, I (Sixth Edition) p. 184.

(2) that there was no time for deliberation for the reason that the invasion was imminent ; and

(3) that nothing had been done in excess of what the necessities of the occasion required for the reason that the British forces had confined their action to the cutting adrift of the vessel, and so depriving the invaders of their means of access "[1]

The invasion of Korea by Japan in 1904 was justified on the ground of self-defence. The violation of the neutrality of Belgium by Germany in 1914 though in contravention of the terms of the Treaty of 1839 and the rules of General International Law was sought to be justified on the ground of self-defence. The Chancellor, Von Bethmann-Hollweg speaking before the Reichstag appealed thus: "Gentlemen, we are now in a state of necessity, and necessity knows no law ! Our troops have occupied Luxemburg, and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of International Law. It is true that the French Government has declared at Brussels that France in willing to respect the neutrality of Belgium as long as her opponent respects it. We knew, however, that France stood ready for the invasion. France could wait but we could not wait ... .Any body who is threatened as we are threatened, and is fighting for his highest possessions, can have only one thought—how he is to hack his way through." This plea of self defence has not been approved. Japan claimed that her action in Manchuria in 1931 was defensive but the League of Nations denounced that action. The attack of Russia or Finland was sought to be justified on the ground of self-defence. The necessity of self-defence was pleaded to justify the intervention of China in the affairs of the Korea in 1950. China invaded Tibet in 1950 and when India protested the Chinese Government pleaded self defence and maintained that the crossing of the 38th Parallel in Korea and the presence of the Allied troops at the border of Manchuria was a threat to its security and that it was necessary to intervene in Tibetan affairs.

The Charter of the United Nations expressly preserves the inherent right of individual or collective self-defence in case an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and securiry. It further provides that a report of the measures taken in

1. Pitt Cobbet : Cases on International Law Vol. I (Sixth Edition) p.184

exercise of the right of self-defence should be made immediately to the Security Council.

2. Intervention on Grounds of Humanity.—Nineteenth century saw a new ground—the ground of Humanity to support an intervention. Several interventions on this ground took place. In 1827 Great Britain, France and Russia, the Great Powers, jointly intervened in struggle between revolutionary Greece and Turkey which committed such atrocities as shocked the conscience of Europe. Further interventions took place in 1860 to protect the Christians of Mount Lebanon and in 1878 to secure freedom of Balkan States. Whether intervention on the ground of humanity is permitted by International Law at the present time is a question which requires some consideration. In this connection a reference may be made to the Charter of the United Nations to find out whether it contains any guarantees for the rights of man in general. The Charter begins with a declaration to the effect that the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. One of the purposes of the United Nations is expressed to be international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms of all without distinction of race, sex, language, or religion. One of the functions of the General Assembly is to initiate studies and make recommendations for the purpose of realisation of human and fundamental freedoms. Further, the Economic and Social Council is authorised to make recommendations with the object of promoting universal respect for and observance of, human rights and fundamental freedoms for all. It is also required of the Social and Economic Council to set up a commission for the promotion of human rights. As a matter of fact the promotion of humanitarian interests is one of the important obligations of the United Nations. The Charter further enjoins upon the members to refrain in their international relations from threat or use, of force against the territorial integrity or political independence of any State. The United Nations are not authorised to intervene in matters which are essentially within the domestic jurisdictions of any State. These provisions condemn intervention in general and collective intervention in domestic matters in particular. "The Charter of the United Nations in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organization marks a further step in the direction of elevating the principle

of humanitarian intervention to a basic rule of organized international society. This is so although under the Charter as adopted in 1945 the degree of enforcibility of fundamental human rights is still rudimentary and although the Charter itself expressly rules out intervention in matters which are essentially within the domestic jurisdiction of the State."[1] Once it is conceded that the promotion of humanitarian interest is one of the legitimate concern of the United Nations, it ceases to be matter essentially within domestic jurisdiction of a State. It would thus appear that in accordance with the provisions of the Charter collective intervention on the grounds of humanity is permitted. In 1946 the United Nations took notice of the dispute between India and South Africa with regard to the treatment of Indians in South Africa. The General Assembly adopted a Resolution wherein opinion was expressed that the treatment of Indians should be in conformity with the international obligations under the agreements between the two Governments and the relevant provisions of the Charter. In 1947 the second Assembly requested the two Governments to enter into negotiations for a settlement.

Intervention on the grounds of humanity was supported by *Gentilis* who held the view that nationals of a State when oppressed by their own Sovereign were entitled to be defended. *Grotius* was prepared to call a war just if it was to be waged to prevent the maltreatment by a State of its subjects. He observed: "If a tyrant......practices atrocities towards its subjects, which no just man can approve, the right of human, social connection is not cut off in such a case." A good number of writers *e.g.*, Vattel, de Martins, Heffler, Bluntchli, and Phillimore favoured the view that humanitarian intervention was not only proper but was permitted under the rules of International Law. Some of the writers condemned such an intervention which according to him could be easily abused for political purposes. Intervention on grounds of humanity has the tendency of being resorted to in matters properly falling within domestic jurisdiction of the intervened State. Moreover, resting as it does on the discretion of a State the right to intervene on grounds of humanity furnishes a weapon of coercion to States for selfish ends.

The Charter of the United Nations for promotion of human rights and fundamental freedoms has elevated the principles

1. Oppenheim :—International Law Vol. I p. 280.

of humanitarian intervention and provides collective intervention. Under the United Nations Organisation it is not possible for an individual State to intervene on the grounds of humanity. If there occurs a repeated violation of human rights within a particular State, it will be a threat to international peace and security and the United Nations would arrange for collective intervention.

3. Intervention in Civil War.—A revolution or a civil war within the territory of a State is purely a domestic affair and no foreign State has a right of intervention. It furnishes a ground for intervention only when it amounts to a threat to the peace and security of a foreign State. "A revolution or a civil war within the dominion of a particular State may be a source of grave concern to a neighbouring power. Its commerce may be adversely affected ; its obligations as a neutral (in case the insurgents are recognised as belligerents) may prove to be exating and onerous. Nevertheless, the fight for the reins of Government is not in itself internationally wrongful. Until the conduct of hostilities, by reason of the mode or place of operations, or through some other circumstance, menaces the safety of the outside State, or otherwise directly interferes with the exercise by it of some definite right which should be respected ; no ground for intervention is apparent."[1] A neighbouring State may find itself insecure by the civil war going on within the territory of a particular State and may have reason to intervene, but States which are far flung and which have no such reason to fear will not be justified in their intervention in the affairs of another State. The American Government during the Spanish civil wars declared its policy of complete impartiality and stated that 'in conformity with its well-established policy of non-interference with internal affairs in other countries either in time of peace or in the event of civil strife, it will, of course scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation."

The Troppau Protocol of 1820 coming after the Congress of Vienna of 1815 provided excommunication from the Family of Nations of States which had undergone a change in government due to revolution, the results of which threatened other States and for bringing the guilty State back to the Holy alliance. This Protocol opened a new way for intervention with the result that Austria intervened to suppress civil war in Italy in 1821 while France intervened in Spain in 1823 for the same purpose. In 1827 the Great Powers jointly

1. Hyde ; International Law p. 255.

intervened to secure independence of Greece. In 1849 Russia intervened to assist Austria in the suppression of revolt in Hungary. In the nineteenth century such interventions were many and frequent.

In 1928 the American States adopted a Covenant at Habana regarding duties and rights of States in civil wars. This Covenant required third States to use all means at their disposal to prevent their inhabitants from participating in civil wars of neighbouring States, to intern rebel forces crossing their territories and to forbid the traffic in arms except with the Government in case the insurgency had not been recognised. The Civil wars of Spain in 1936 led Germany and Italy to intervene on the side of General Franco. Russia intervened on behalf of the Loyalists while Great Britain and France laid embargo against both the sides. Thereupon the Council of the League of Nations adopted a resolution whereby it affirmed the obligations of the States to refrain from intervention in the internal affairs of another State.

After the establishment of the United Nations with its injunctions against intervention the States have considered it fit to intervene in civil wars. The Soviet Union in 1945 intervened in Iran and supported its rebels in Azerbaijan. In 1940 Great Britain intervened in Greece by supporting the Government against guerillas. In 1947 Yugoslavia, Albania and Bulgaria also intervened in Greece and gave support to guerillas.

These recent instances of intervention on the part of individual States may not be taken to prove that intervention by a State in the civil war of another State is permissible. These cases may be regarded to be violations of the Charter rather than proof of any right. There is no doubt that the Charter of the United Nations condemns individual intervention and imposes an obligation upon States to refrain from the threat or use of force against the territorial integrity or political independence of any State. In view of this, intervention by individual States in the civil wars of other States can not be admissible in International Law.

Monroe Doctrine.—The Monroe doctrine may be regarded as American reaction of the Holy Alliance of Europe after the Napoleanic wars. American States which hitherto belonged to Spain had declared their independence which had been recognised by the United States. The powers of the Holly Alliance wanted to assist Spain in regaining her posses-

sions and to intervene in the American affair. President Monroe of the United States regarded this Alliance dangerous to American peace and security and considered it of imperaative necessity to forestal any European intervention in the affairs of America. To avert this imminent danger President Monroe delivered to Congress on December 2, 1823 his famous message which has gone down in history as the Monroe Doctrine. The portions of this message which constitute the main theme of this Doctrine are :—

(1) "That the American continents by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonisation by any European power".

(2) "In the wars of the European powers in matters relating to themselves we have never taken any part nor does it comport with our policy to do so........."

(3) "With the Government who have declared independence and maintained it and whose independence we have on great consideration and just principles, acknowledged we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition towards the United States."

This declaration of President Monroe provided a weapon of self-defence to the American continents throughout the troublous period of the last century. The Monroe doctrine is not a rule of International Law but expresses the political policy of the Americans. President Wilson observed :—"The Monroe doctrine is not part of International Law. The Monroe doctrine has never been formally accepted by any international agreement. The Monroe doctrine merely rests upon the statement of the United States that if certain things happen she will do certain things." This Dotrine proclaimed a policy opposing the intervention of the powers of the Alliance in relations between Spain and its American colonies and it greatly served its purpose.

Prof. *Brierly* describes the significance of this doctrine thus :—

"The Monroe doctrine is a policy which the United States has followed in her own interest more or less consistently for more than a century, and in itself is not contrary to International Law, though possible applications of it might easily be so. But it certainly is not a *rule* of International Law. It is comparable to policies such as the 'balance of power' in Europe, or the British policies of maintaining the independence of Belgium or the security of our sea-routes to the East, or the former Japanese claim to something like a paramount influence over developments in the Far East."

Whenever this doctrine was challenged the United States rose to the occasion and successfully opposed intervention by the European powers. When Great Britain refused to settle the boundary dispute between it and Venenzula, the United States Secretary of State asserted that "the United States is practically sovereign on this continent and its fiat is law upon the subjects to which it confines its interpretation." Again in 1912 the United States gave this Doctrine an extensive interpretation when it protested against the intended sale of the Magdalena Bay to a Japanese company. The Monroe doctrine was embodied in Art. 21 of the amended Covenant of the League of Nations. Thus the policy of American continent as expressed in the Monroe doctrine stood recognised by the members of the League. This Monroe doctrine which had hitherto remained unilateral was converted into a multilateral policy of all the American republics as a result of International Conferences of American States of 1936 and 1938. These Conferences were followed by a Declaration made in 1940 at the meeting of Foreign Ministers. In this Declaration it was asserted that any attempt by any non-American State against the independence of any American State would be regarded as an act of aggression against States signing the Declaration. This Declaration was repeated in the Act of Chapultepec of 1945. The Charter of the United Nations had not disturbed the policy embodied in the Monroe doctrine by recognising, "the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations." This doctrine finds expression in the Inter-American Treaty of Reciprocal Assistance of Rio De Janeiro in 1947.

This Doctrine had its effect on the policies of some of the non-American countries. In 1928 Great Britain before agreeing to the Treaty for the Renunciation of War made it clear

that "there are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect." The above note embodies the spirit of the message of President Monroe.

Japan took a similar attitude when it went to war with Russia in 1904. In April 1934 Japan declared that it would oppose any help by any foreign powers to China.

The Drago Doctrine.—This doctrine named after Dr. Drago the Foreign Minister of Argentine Republic is a supplementary to the Monroe Doctrine. The Drago Doctrine lays down that "a public debt cannot give rise to the right of intervention and much less to the occupation of the soil of any American nation by any European power." "This Doctrine was necessitated by the events of the time when States in order to realise the claims of their nationals against foreign States had begun to employ force or threat of force. In 1902 Great Britain, Germany and Italy jointly blockaded Venezuela with the object of forcing it to discharge its monetary obligations. President Roosevelt on receiving an assurance that no portion of the country would be occupied did not intervene. Venezuela submitted to arbitration but the States which had blockaded claimed priority. The Hague Permanent Court of Arbitration allowed priority to the claims of Great Britain, Germany and Italy. It may be noted that the Drago Doctrine did not meet with great success in its particular sphere although in its larger implications it went with the Monroe Doctrine. The necessity for the use of the Drago Doctrine is not likely to occur in view of the provisions of the Charter of the United Nations.

Intervention for Balance of Power.—Intervention for balance of power has no meaning at the present time because of the establishment of United Nations with the maintenance of international peace and security as its main objective. The principle of balance of power which had since the Peace of Westphalia been dominating the political thought of Europe lost its significance on the establishment of the League of Nations.

The application of the principle of balance of power was regarded by *Vattel* as essentially necessary for the preservation of peace and order in Europe. He maintained that the balance of power implied an arrangement which guaranteed that no State could be so powerful as to dominate the other States. The Congress of Vienna in 1815 was guided by the principle of the balance of power in its deliberations. The Crimean War of 1854 was waged to maintain the balance of power.

Russian intervention in Hungary.—Hungary became a 'Peoples Republic under the new Constitution in August, 1949. Its position in 1956 was that of a Stalinist totalitarian police State governing its people with an iron hand. The Rakosi Government was mismanaged and a large section of Hungarian subjects detested this rule of tyranny. Towards the end of October the Hungarian people rose in an armed revolt against the Government. This revolt assumed the shape of a regular Civil War which was not only confined to the capital but spread to a wide territory in Western Hungary involving loss of large number of lives. The rebels demanded the return of Imre Nagy as Premier who had been ousted by the Stalinist party. The frightened rulers acceded to this demand. Nagy on taking over the government promised a coalition government of all democratic parties and free Western Style elections and thus the termination of absolute Communist rule. He also assured the angry mob that he would see that all wrongs done to the people are set right and asked them to support the National Government. He further announced that a programme for raising the living standard of the people and for improving the economic conditions would be launched. These various proclamations of Imre Nagy did much to ease the tension of the civil strife, but sporadic fighting in the capital did not cease. The Soviet Russian Government could not tolerate the non-Communist Nagy Government and the end. of the Communist rule and thought fit to intervene to overthrow Nagy and his Government. Nagy got a clue and fled and took asylum in Yugoslav Embassy. The Nagy Government broke down and again the civil war which had subsided flared up with greaser fierceness. The Russian military forces filled the country and a reign of terror came to prevail.

A graphic description of this intervention is given by *Schuman* thus: "At dawn on Sunday morning, Nov. 4, 1956, thousands of Soviet tanks moved into Budapest and other major cities. All opposition was pitilessly smashed.

Pathetic rebel appeals for western aid elicited no response save sympathy and shouts of "Murder." The Nagy Cabinet was suppressed. The luckless Premier, long a fugitive in the Yugoslav legation, was ultimately deported to Rumania despite protests from Belgrade at violation of a promise of safe-conduct to his home. The Cardinal sought safety in U. S. Legation. A New Revolutionary Worker's and Peasant's Government headed by Kadar acquiesced in the flight of 175,000 refugees to Austria and thence to other lands (with a conscience-stricken America generously supporting the escapees) and strove to restore order by a combination of concessions and repressions while rejecting all proposals for U. N. observers"[1]

Mr. Janos Kadar formed the new Government with Soviet help. Mr. Nagy, the former Premier who had taken refuge in Yugoslav Embassy in Budapest was promised by Kadar 'safe-conduct' to his home. The Russian armed intervention in Hungarian affairs was atonce reported to the United Nations Security Council and the United States of America moved a resolution calling upon Russia to desist from intervening in the internal affairs of Hungary and to withdraw its forces without delay. The Soviet Union vetoed the resolution and the United States of America asked the General Assembly to meet at a Special Session. On November 9, 1956 the General Assembly asked Russia to rceall its military forces from Hungary and to allow the elections to be held under the United Nations supervision. On November 19, 1956 the Russian Foreign Minister assured the General Assembly that Russian troops would be recalled as soon as normal conditions prevail in Hungary. Russia however protested and asserted that in this matter the General Assembly was not competent to pass a resolution in respect of the internal affairs of Hungary. It also justified its intervention for its Delegate on November 19, 1956 before the General Assembly said: "We could not but take into consideration that Hungary is bordering on the Soviet Union and that U. S. S. R. is linked to Hungary by the Warsaw treaty of friendship, cooperation and mutual assistance uniting a group of States. The victory of the reactionary forces in Hungary would convert her into a new spring-board for aggressive war, not only against the Soviet Union but also against the other countries of East Europe." The rebellion was put down by the Hungarian Government with the assistance of the Russian military forces.

1. Schuman : International Politics p. 420

The Soviet intervention in Hungary is sought to be justified on a number of grounds. It is said that the Soviet Russia did not enter of its own initiative but went first at the request of Nagy and thereafter at the request of the Kadar Government and that these Governments asked for help in exercise of their inalienable right of self-defence against the aggression of the rebels. It is also maintained that Russia was under an obligation imposed upon it by the Warsaw Pact to repluse the aggression against Hungary. Again, the intervention is justified on the ground that the Civil War in Hungary which borders on the Soviet Russia meant a threat to the security of Russia. It is also stated that the Civil War in Hungary constituted an armed attack on Hungary and a threat to the maintenance of international peace and security as contemplated by Article 51 of the Charter and Russia was justified in exercising the right of individual or collective self-defence.

International Law permits intervention on a few grounds and the Russian intervention is to be justified on these grounds alone. According to *Oppenheim* dictatorial intervention is as a rule forbidden by International Law. The cases in which dictatorial intervention is permitted provide exceptions to the general rule. The Russian intervention does not properly fall within these exceptions and cannot be justified under the law. The right of self-defence under International Law is exercised by a State against another State under certain well-defined conditions. The Hungarian Gnvernment faced with a rebellion of its own subjects, had no right of self-defence. Its invitation to Soviet Russia to intervene was of no consequence and could not validate the Soviet action which was prohibited under International Law. *Hyde* States the law thus : "Nor is the situation legally altered by reason of the fact that intervention occurs in pursuance of a treaty of guarantee or that such action is in response to an invitation from either party to the conflict. Foreign interference howsoever invoked, is necessarily directed against a portion of the population of a State, and is thus a denial af its right to engage in or suppress a revolution or of employing its own resources to retain or acquire control over the Government of its own country."[1] The Russian intervention cannot be justified on the ground that it was made at the call of the Hungarian Government.

The Warsaw Pact of 1955 which is a Treaty of Friendship Cooperation and Mutual Assistance was brought about

1. Hyde :—International Law, (2nd Ed) at p. 253.

by nine countries which were guided by the objects and principles of the Charter of the United Nations. The signatories to the Pact were 'desirous of further promoting and developing friendship, cooperation and mutual assistance in accordance with the principles of respect for the independence and sovereignty of States and of non-interference in their internal affairs'. In Article 8 of the Pact each of the Contracting Parties solemnly undertook to adhere to the principle of respect for the independence and sovereignty of others and non-interference in their internal affairs. This Soviet intervention was clearly in violation of the solemn promise given in the Pact and cannot be justified on the terms of the Pact. Moreover, the Civil War in Hungary cannot be described as an armed attack against the lawful Government of Hungary, as envisaged by Article 51 of the Charter of the United Nations. The armed attack as contemplated by Article 51 of the Charter is one made by one State against another and is not one by a rebellious population against its own State. The Hungarian Civil War cannot fall within the scope of Article 51 and there arose no occasion for measures of collective security. Article 51 cannot provide a justification for the suppression of an internal disturbance of one State by the forces of another State. The internal disturbance was not at all a threat to the peace and security of Russia and there was nothing to justify the intervention in exercise of the right of self-defence of Russia. The Soviet intervention was thus in violation of the rules of International Law.

Chinese interventions in Tibet—The tumultuous events in Tibet leading to the historical flight of Dalai Lama and the grant of asylum to him by India have raised questions of great international importance. India figures very prominently in the problems that have arisen. In order that a correct legal view of these various events be taken it is necessary to describe the position of Tibet as a State and its relations with China and India.

Tibet is a high plateau surrounded by mountains having India, Kashmir, Nepal, Bhutan and Burma to its South and China to the North and East. It covers an area of about 470,000 square miles and has a population of about 3.75 millions. Lhasa is the Capital of Tibet having a population of about 50,000 Tibet is a land of Buddhism and one third of her adult population live in monasteries which are scattered over the whole country. Tibetans believe in reincarnation of Buddha and their Buddhism is generally known as Lamaism which

stands for a philosophy uniting religion and the State. "Tibet is a sort of theocracy in which Dalai Lama, enthroned at Lhasa, is Supreme in both spiritual and temporal affairs and in which the grand lamas of the various monastic centres together with their throned Lamas or monks virtually rule the nation." The Dalai Lama is regarded as an incarnation of the Bodhi-Sattva Chanrezi (*Avalokitesvara*) and is therefore known as the 'Living Buddha.' He is both a temporal and spiritual ruler of Tibet.

After the conquest of China by Manchu who established an empire, Tibet came under the authority of China. It is not clear whether it was a part of the Chinese empire or was simply under some control of the Chinese Government. There is record of this fact that in 1720 the Chinese Government posted two representatives (which were known as Ambans at Lhasa and the Ambans continued to exercise great influence in the Tibetan Government till 1911 when the Manchu dynasty collapsed. It appears that there existed friendly relations between China and Tibet. China gave military help in repelling the Nepalese invasion of Tibet in 1792. In 1841-1842 Kashmir invaded Tibet and China used its good offices in bringing about a settlement leading to a Treaty which was signed by Tibet, Kashmir and China. The Treaty of 1856 between Nepal and Tibet after the Nepalese invasion of 1854 furnishes a proof of the fact that Tibet was a sovereign State and not a part or a protectorate of China. The importance of Chinese influence over Tibet was felt by the British Government of India. In 1873 a British Government representative was deputed to expose the possibilities of re-establishing trade relations between India and Tibet. In 1876 Great Britain entered into a treaty with China which undertook to provide facilities to the British Mission on its visit to Tibet. Tibetans refused to recognise this treaty and the British Mission was abandoned. They then erected a stone fortress across the trade-route which the British regarded as within the territory of Sikkim under their control. Great Britain protested to China and China tried in vain to influence the Tibetan Government. A British military force drove the Tibetan out of Sikkim and thereafter the matter was settled by a Convention with China in 1890. The British Government did not regard Tibet as a sovereign power but a State under the control of China. It was not until 1893 that the real position of Tibet in relation to China became fully known. In that year China and Great Britain entered into a Convention whereby the British were allowed

to trade with Tibet under certain conscessions allowed by China. The Tibetan Government refused to acknowledge the validity of that Convention with the result that in 1904 British military mission with show of force exacted concessions from the Tibetan Government. These events clearly exposed the falsity of the Chinese claim of suzerainty over Tibet. The Tibetan Government repudiated the Anglo-Chinese Convention of 1893 and ordered the removal of the boundary pillars erected under that Convention. The British Government then realized their mistake in regarding China as the paramount power having authority over Tibetan affairs. It then made attempts to open negotiations directly with Tibet but failed to achieve the desired result. In 1903 when China asked Tibet to join it in negotiations with the British Government, Tibet refused. The British Indian Government directed a military mission to enter Tibet in 1903. The British forces entered Lhasa, the Dalai Lama fled and a Treaty with the British was concluded in 1904. As a result of this treaty, Tibet undertook to respect the Anglo-Chinese Convention of 1890 and to erect boundary pillars. The Chinese Government made no protest against the direct dealings of Tibet with Britain without any reference to it. This Treaty dispelled all doubts about the independence of Tibet as an international personality and resulted in opening trade relations with Tibet. Under this Treaty of 1904 the Tibetan Government did not only undertake to raze all forts and fortifications and remove all armaments that might impede the course of free communication between the Tibetan territory and the British territory but also promised not to cede, sell, lease, mortgage or otherwise give for occupation any portion of its territory to any foreign Power without the consent of the British Government. It was also provided for in the Treaty that the Chumbi Valley will be occupied by the British as security for performance of the terms of the Treaty. The terms of this Treaty amply justify the statement of Lord Curzon, the Viceroy of India, that 'Chinese suzerainty over Tibet was a constitutional fiction—a political affectation and nothing more.'

The British Government in order to secure its position *vis a vis* the Tibetan Government and to render all obstructions at the hands of the Chinese entered into a Convention with China in 1906. This Convention allows China to share the concessions allowed under the Convention of 1904 and in full measure confirmed the independent action of Tibet in entering into the Convention of 1904. This followed by the Convention

of 1907 between Great Britain and Russia in relation to Persia, Afghanistan and Tibet. The two Powers undertook to respect the territorial integrity of Tibet and abstain from all interference in the internal administration. They also undertook to negotiate with Tibet through China, although in commercial relations Great Britain reserved its right to negotiate directly with Tibet. Later on, it appears that China increased its influence over Tibet for in the conclusion of the Trade Regulations of 1908 China acted as a superior authority over Tibet. These Regulations were signed not only by China and Great Britain but also by the representative of the Tibetan Government under the directions of China. Tibetan Government accepted a subordinate position in these Regulations and the Chinese Government encouraged by the Tibetan attitude took measures to make Tibet a Province of China. Chao Erh-feng was appointed by the Chinese Government to bring Tibet under control. He moved throughout Tibet with his forces and spread a net-work of political strategy, and succeeded in establishing by force and also by persuasion a loose system of administration throughout Tibet. The Dalai Lama lodged a protest with the Chinese Government but before anything came out of this diplomatic move Chao Erh feng in 1910. with a strong force invaded Lhasa. The Dalai Lama fled and found asylum in India. Chinese forces occupied the Tibetan territory but this conquest was not a complete one. At this crucial time a civil revolution within China overthrew the Manchu dynasty and the Chinese troops in Tibet rose in rebellion against their own officers. The result was that Chao Erh feng was murdered, the Chinese troops were driven away, no traces of occupation and Chinese remained. On April 21, 1912, the President of China declared Tibet to be a Province of China but the British Government refused to recognise Tibet as a Chinese Province. China sent its forces to subjugate Tibet in 1913. The Tibetans fought fiercely and their Government declared the independence of Tibet. The British Government for the purpose of bringing about a peaceful settlement of Chinese-Tibetan dispute invited China and Tibet to a tripartite Conference at Simla on April 13, 1913. This Conference ended in a Convention which was signed by Tibet and Great Britain but not by China. This Convention of 1914 recognised the suzerainty of China over Tibet but provided that so long as China withholds its signatures from the Convention it would be debarred from the enjoyment of privileges accruing therefrom. The refusal of China to be party to the Convention prevented the coming into existence

of a valid agreement between Tibet and China and the establishment of a legal relation between the two countries. For some time the fighting between Tibet and China ceased but it again broke out in 1917 when Chinese forces were defeated. A truce agreement was arrived at between the contending parties and as a result thereof trade between the two countries was resumed.

In the years following several attempts were made by both the countries for coming to some definite agreement but with no result. In 1928 the Kuomintang Government of China invited Tibet to become a province of the Chinese Empire. Tibet refused the invitation but the Chinese Government declared Tibet a province of China and began asserting authority over the territories of Amdo and Kham. The Tibetans in 1936 drove the Chinese forces from Kham. In 1934 when the Dalai Lama died the Chinese Government sent a Mission which remained at Lhasa till 1940 when the new Dalai Lama was installed. These events did not clarify the position of Tibet in relation to China but they go to show that while China claimed Tibet as a part of its territory, Tibet enjoyed *de facto* autonomy but did not assert to sever the old connections with China. During the Second World War the question of Tibet came in for discussion among China, Great Britain and the United States of America. Great Britain maintained that Tibet was an independent sovereign State, and that Tibetans did not only claim to be independent but had successfully fought to maintain their freedom against Chinese domination. The United States did not agree with this position and stated that China considered Tibet and outer Mongolia as parts of the Chinese Empire and that Great Britain and Russia had already acknowledged the suzerainty of China over Tibet. China regarded Tibet as a part of its territory. Tibet during the war provided an important supply route to China and it considered it an opportune time to assert her independence. Tibet refused to be drawn into war and expressed her unwillingness to allow a supply route through her territories. Great Britain brought to bear political pressure on Tibet with the result that Tibet consented to the supply route but she maintained her claim to independence. In 1943 Tibet demanded clarification of her position in relation to China. Diplomatic notes were exchanged but the ambiguous position did not improve. The Chinese National Assembly which drafted the Chinese Constitution in 1946 provided seats to Tibetans, but Tibet did not consider itself a part of the Chinese territory. It appears that the Tibetan Government did not

authorise Tibetans to sit in the National Assembly and the Lhasa Government did not regard itself subordinate to China.

In 1950 the Lhasa Government while maintaining that it was independent opened negotiations for the settlement of the question regarding her international position. Talks began at Delhi but with no result Then China invaded Tibet in October 1950 and soon captured Chamdo. The Chinese Government announced that the invasion had been made "to free three million Tibetans from imperialist oppression and to consolidate the national defences of China's western frontier." China attempted to advance further but the negotiations for settlement which began after the invasion arrested further progress. The Lhasa Government appealed to the United Nations against this Chinese aggression. The Tibetans asserted that "racially, culturally and geographically, they are far apart from the Chinese." The consideration of this appeal was however postponed by the General Assembly pending the negotiations for peaceful settlement. As a result of these negotiations an agreement popularly known as the Seventeen Point Agreement was signed at Peking on May 23, 1951. This Agreement established the suzerainty of China over Tibet for it provided that China would be responsible for the external affairs of Tibet.

In 1954 the Dalai Lama and the Panchen Lama attended a meeting of the Chinese State Council. The deliberations that followed resulted in the establishment of a "Preparatory Committee for the Autonomous Region of Tibet" with the Dalai Lama as its Chairman. This Committee had little power for the decisions were taken by the Chinese authorities. Political unrest started early in 1956 in Tibet. The Chinese garrison in the Golak district was attacked by the Tibetan Peoples Committee. Rebellion broke out in other parts of Tibet. Chinese forces entered to suppress the revolt. These subversive activities continued and the unrest among Tibetan people went on increasing. The beginning of the present year (1959) saw a revolt of considerable magnitude of nationalist Tibetans. Tibet at that time was in fact ruled by three bodies. One part of Tibet was under the regime of Chamdo Liberation Committee headed by General Wang Chi Mei, the other part under the Panchen Lama's Bureau while the third portion of Tibet was ruled by the Dalai Lama. The Chinese Government invited Dalai Lama to attend without ministers or his body guard a cultural programme at the military headquarters. The Tibetan people surrounded the Palace and demanded refusal of the Chinese invitation. The Tibetan

people in a mass meeting asked the Dalai Lama to declare independence of Tibet. In the night the Chinese forces entered Lhasa and firing began. The Dalai Lama with a few followers miraculously escaped from the palace and after an orduous journey reached India which granted them asylum. Thereafter Tibetans came to India in groups as refugees.

The question of Tibet and the Chinese intervention has now been brought before the United Nations. The events after the flight of Dalai Lama do not show that matters will yield to an easy solution. But there can be no doubt that China did not discharge the obligations imposed upon it by the Seventeen Point Agreement, that it ruthlessly violated the fundamental rights and freedoms of the Tibetans and launched a cruel programme for the total extinction of Tibetans. The existence of Tibet as an international personality has been seriously endangered. The situation has been further complicated on account of the stiff attitude that China has taken both with regard to Tibet and India. The Dalai Lama has repudiated the Seventeen Point Agreement as having been brought about under duress. The Chinese Prime Minister has accused India of intervention in China's domestic affairs and of extending welcome and refuge to the leader of the rebellion in Tibet. China asserts vehemently that the People's Republic of China enjoys full sovereignty over Tibet region as it does over the regions of Inner Mongolia and that no Foreign Power has a right to interfere in her internal affairs.

After the flight of the Dalai Lama to India the Chinese Government set up regime of massacre and repression of the Tibetan people who were loyal to the Dalai Lama. The Dalai Lama appealed to the United Nations for intervention. Later on Ireland and the Federation of Malaya sponsored a resolution in respect of the Tibet question before the General Assembly of the United Nations. Inspite of the Soviet objection to the inclusion of the Tibet question in the Agenda the debate on Tibet in the General Assembly began on October 20, 1959. The debate was initiated by Ireland and the Federation of Malaya who declared that the Assembly had a moral duty in the name of justice and humanity to record its judgment on the ruthless violation of human rights in Tibet and observed that if the Assembly chose to ignore the events in Tibet its silence on the matter can only be interpreted to mean a connivance of the infringement of the very principles which it was pledged to uphold.

The Assembly was requested to 'exercise all its moral force to see that peace is restored in Tibet, that the fundamental human rights of the Tibetan people are preserved and respected and that their right to maintain their distinctive cultural and religious heritage and autonomy is not violated and that any reforms introduced in the interest of progress should only be made in the manner consistent with respect for fundamental human rights and not by the use of brute force.' The Soviet Union and other countries of the Communist bloc voted against the resolution. The Soviet delegate asserted that the resolution was a 'clumsy maneauvre designed to bring the United Nations back to the dark period of the cold wars.' Great Britain and some other countries doubted the competence of the General Assembly to deal with the Tibet question on the ground that as China claimed unrestricted sovereignty over Tibet, the question was one of internal affair and they therefore abstained from voting. India also abstained from voting on the ground that it considered that any warming up of the issue would not lead to a reconciliation and that the welfare of the peoples concerned depended upon the degree of restraint that could be exercised. The Resolution was later adopted by the Assembly by 45 votes to nine with 26 abstentions. Two Countries did not vote.

CHAPTER XXII

SELF DEFENCE IN INTERNATIONAL LAW

Nature of the right of Self-defence.—In an earlier Chapter it has been stated that the right of self-preservation is inherent in a State and that a State like an individual has a right of self-defence so that acts violating the personality of another State will go unnoticed by International Law if there existed a necessity for these acts. The right of self-defence flows from the fundamental right of self-preservation. This right is expressly recognised in Article 51 of the Charter of the United Nations which lays down that nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and secu-

rity. International Law excuses an act of one State which is injurious to another State if prompted by self-preservation in necessary self-defence.

It is however necessary to examine the nature and scope of this right. Every State possesses a right of self-preservation. In as much as a State has a right of self-preservation it has a right to defend itself against actions which are likely to threaten its existence in any manner or are likely to impair its sovereignty. *Wheaton* observes : "Of the absolute international rights of States, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other States but a duty with respect to its own members, and the most solemn and important which the State owes to them. This right necessarily involves all other incidential rights, which are essential as means to give effect to the principal end. Among these is the right of self-defence".[1] It is by the exercise of the right of self-defence that a sovereign State can maintain its existence. *Hall*, describes this right thus : "Even with individuals living in well-ordered communities the right of self-preservation is absolute in the last resort. A fortiori it is so with States which have in all cases to protect themselves." The right of self-preservation is a necessary incident of sovereignty and has been recognised by the usage and the opinion of nations. The duties which a State owes under International Law are subordinate to this right. But it may however be noted that this right of self-preservation though absolute and unconditional has its own limitation. *Oppenheim* observes : "Most writers maintain that every State has a fundamental right of self-preservation. However, if every State really had a right of self-preservation all States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation on the contrary, although self-preservation is in certain cases an excuse recognised by International Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repel them."

Since every State is possessed of the right of self-preservation, an act done in exercise of this right by a State X, may amount to a violation of the same right of self-preservation possessed by another State Y. As it is possible that the exercise of this right by a State may directly effect the security of another State, it is proper that there should be some restrictions on the exercise of

1. Wheaton—Elements of International Law, Page, 115-116.

this right. The exercise of the right of self-defence therefore, finds its limitation in the correspondent rights of the other States arising from the primeval right of self-preservation. That being so, it cannot be maintained that any act in the exercise of the right of self-defence is permissible under the International Law. That a right of self-defence arising out of the principal right of self-preservation exists is not open to doubt. The difficulty lies in the application of the rule of self-defence to a particular international situation. *Brierly* observes : "self-defence, properly understood, is a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question. It is not a question on which a a State is entitled, in any special sense, to be a judge in its own cause."[1]

The legal conception of self-preservation and the cognate right of self-defence is not a mere clock for concealing violations of International Law but is based upon an instinct which is common both to States and individuals and which is often likely to come into conflict with duty imposed by law. This instinct of self-preservation can hardly be over-looked either by National or International Law. The purpose of law is simply to regularise the influence of this instinct in such a way that the duty imposed by law may co-exist with this instinct. The existence of a State depends very much on its power to protect itself in the community of States and although every State has a right to exist, in practice the strong State is always a menace to the weak State. International Law in recognising the right of self-defence aims at enabling a weak State to exist side by side with a strong and powerful State.

Scope of the right of self-defence.—The right of self-protection or self-defence recognised by International Law affords a justification for certain violations committed by a State. The exercise of this right is not limited to cases in which the existence of the State exercising the right is threatened by an individual or another State but also extends to cases in which the existence of the State is endangered by some action of nature. *Oppenheim* observes : "The term self-defence must not here be understood it its narrower sense as meaning defence against an act of an individual only, but also in its wider sense as meaning the warding off of a disaster caused or threatened by the work of nature. For instance, if a river flowing successively through the territories of two States is provided with a lock in the lower State, and, if through a sudden rise of the upper part of the river, the territory of the

1. Brierly : The Law of Nations, page, 295.

upper State be dangerously flooded and if there be not sufficient time to approach the local authorities, it would be an excusable act on the part of the upper State to send some of its own officials into the lower State to open the lock." Acts done in the exercise of the right of self-defence are excused only when they are prompted by some grave necessity. The case of the *Caroline* enunciates the principle of necessity applicable to cases of the exercise of the right of self-defence. During a rebellion in Canada in 1838 a body of insurgents armed and organised in American territory had occupied an island on the American side of the Niagara river and wanted to land in Canada by a steamer called the "Caroline". The British Government in Canada anticipating this attack sent across the river to a point on the American side a force which captured and destroyed the "Caroline" killing also two of the crew. In answer to the protest by the American Government it was stated on behalf of the British Government., that the act was committed in exercise of the right of self-defence. Mr. Webster the American Secretary of State asserted that the necessity required to support the case of self-defence must be "instant, overwhelming, and leaving no choice of means and no moment for deliberation," and that the act committed in self-defence must not be unreasonable or excessive. The British Government while expressing its regret for what had happened maintained that there was no choice of means, no time for deliberation and that nothing was done in excess of what exigency of the situation required. The American Government, accepted this explanation. The case of 'Caroline' is an authority for the proposition that an act will be considered to be one in self-defence if there was necessity and if the act done was not in excess of what the necessities of the occasion required.

There is no doubt that in the first instance it is the State which has to decide whether it would be justified in acting in self-defence and whether the facts of a particular situation warrants the exercise of the right of self-defence. But it is not true that its decision on the question of self-defence is final. The other State or States affected by the act are entitled to protest and to show that the act cannot be justified on the ground of self-defence. *Brierly* observes : "It is not a question on which a State is entitled in any special sense, to be a judge in its own cause." The practice of States shows that an act committed in self-defence by a State can be judged by other States or an International organization. The Charter while preserving the right of self-defence expressly requires that measures taken in the exercise of right by self-defence are to be

immediately reported to the Security Council. It further provides that those measures of self-defence shall not affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain international peace and security. Whether or not a case of necessity of self-defence has arisen can be judged by other States or International Organization or Tribunal. The State committing acts what it considers to be self-defence can not legitimately refuse to abide by any impartial decision. *Oppenheim* observes : "The refusal on the part of the State concerned to submit to or abide by the impartial determination of that question must therefore be deemed to be *prima facie* evidence of a violation of International Law under the guise of action in itself-preservation".

Self-defence is a jurisdiction for some forms of extra territorial action also. It is in the exercise of the right of self-defence that a State can protect itself from injury to it by a vessel on high seas flying a foreign flag. The case of the '*Airginius*' illustrates the principle of self protective jurisdiction. It was maintained in that case that the law of nations conferred on a State whose safety is threatened, a self-protective jurisdiction to visit under circumstances of grave suspicion a vessel on high seas flying a foreign flag for the purpose of ascertaining its real object and destination and also to arrest the vessel and send it for adjudication. This right of visit and capture can be exercised only when the danger is imminent and the circumstances attending the local situation and the conduct of the vessel are of grave suspicion.

The rule of 'hot pursuit' may be traced to the right of self-defence. Under this rule a State is entitled to assert its jurisdiction on a foreign vessel which has escaped to the open sea after comitting some breach of its laws. It is necessary that the pursuit should be started immediately and the vessel should be arrested during the pursuit. If started immediately the pursuit may be continued even on the waters of another State.

Historical instances of self-defence.—It will be interesting to note a few instances where measures in self-defence were taken by States. On a careful analysis it would appear that the exercise of the right of self-defence largely depends on the physical power of a State to protect itself. *Fenwick*, very correctly observes : "But as a practical matter the continued existence of a State, or at least the continued integrity of its territory depends upon its own ability to protect itself in a

community of fellow States some of which were all too ready to solve their controversies with other States by an appeal to the sword and to retain by right of conquest whatever might fall to their lot in the established trial by battle. There being no organisation of the community for mutual protection, each State had to look to its own security and had to build up around itself such defences as its resources permitted. In consequences the right of existence on the part of the weaker States was often precarious, and on occasion no more than a legal fiction. Poland, divided within itself, fell a prey to ambitious neighbours in 1772-1795. Hanovar, was annexed by Prussia in 1864. Korea was taken over by Japan in 1910. Whatever jurists might say as to the abstract right of existence the actual enjoyment of the right was largely conditioned upon the physical power of the individual State to meet attacks upon it."[1]

Case of the Danish Fleet (**1807**).—During the war between Great Britain and France there was an apprehension of the Danish fleet coming to the help of France by virtue of a term in the Treaty of Peace of Tilsit. The British Government while guaranteeing protection of Denmark against French attack asked Denmark to place her fleet under her control with a promise to return it after War. Denmark refused and Great Britain in exercise of her right of self-defence shelled Copenhagen and captured the Danish fleet.

Case of Amelia Island (**1817**).—A band of buccaneers led by one Mc-Gregor had seized Amelia Island belonging to Spain in 1817 and it began its looting operations against Spanish and American merchant ships. Spain was powerless to subdue this band and stop its activities. President Monroe of the United States sent a vessel of War to drive away the marauders and to destroy their vessels and their works on the island. This measure was taken in exercise of the right of self-defence.

Japanese invasion of Manchuria (**1931**).—Japan attacked Manchuria in 1931 and claimed to justify its action on the ground of self-defence. The matter was referred to the League of Nations and a Commission of Enquiry was appointed to make a report. This Commission reported that the action of Japan was in violation of the Covenant and could not be regarded as a measure of self-defence. The Commission further observed that it did not exclude the hypothesis that the

1. Fenwick.—International Law (Third Edition) p. 228-229.

officers on the spot may have thought that they were acting in self-defence. The League of Nations adopted this report. Japan contested the position of the League to enquire into and determine the question of the legality of the action.

It is obvious that the contention of Japan was not well founded and that the question whether its action was justified on the ground of self-defence could be gone into.

The First World War.—Germany claimed justification for her attack on the neutralised Luxemburg on the ground of the right of self-preservation. The Chancellor, *Von Bethmann—Hollweg* speaking before the Reichstag observed that the necessity of the situation compelled Germany to invade and occupy Luxemburg. He said : "A French movement upon our flank upon the lower Rhine might have been disastrous. So we were compelled to override the just protest of the Luxemburg and Belgian Governments".

It may be noted that great actrocities can be committed on pretext of this right of self-defence. Germany fought to justify action on the ground of self-defence, although as a matter of fact it had no right to commit act in violation of the neutrality.

Great Britain and French Fleet (1940).—After France had entered into an armistice with Germany in 1904 the French fleet found refuge into the French North African post of Oran. Great Britain fearing that the French fleet would pass into German control required the naval commander of the French fleet to place it under British control, or to sail to some distant part to be demilitarised or to sink it. The French commander refused to comply with this request whereupon the British naval and air ships made an attack on the French fleet and sank or damaged a substantial portion of the fleet.

The Lend-Lease Act (1940).—This was one of the measures adopted by the United States of America for self-defence during the early phases of the Second World War. It may be recalled here that the German invasion of Denmark, Norway, Belgium, Holland and Luxemburg brought about a change in the attitude of impartiality taken by various States. The United States of America mainly on the ground of self-defence modified its attitude of neutrality. Following an agreement entered into with Great Britain in September, 1940, for the transfer of fifty over-age destroyers the United States Government introduced the Lend-Lease Bill in the Congress. The Lend-Lease Act was passed in March, 1941

for the purpose of promoting the defence of the United States. This Act authorised the President to manufacture.........any defence article for the Government of any country whose defence the President deems vital to the defence of the United States, 'to sell, transfer title to, exchange, lease, lend or otherwise dispose of, to any such Government any defence article. This was an important legislation for the national defence and although it was not consistent with the traditional attitude of impartality it was certainly a measure of self-defence. *Oppenheim* observes: "In addition the United States relied, solemnly and repeatedly, on the right of self-preservation as justifying in the law unprecedented departure from the established rules of neutrality. That appeal to the plea of self-preservation received a most persuasive addition of strength through the fact that, in the eyes of practically all the peoples of the world, the national cause of the United States, vitally menaced by the ostensible will for world domination on the part of Germany, became identified with the survival of the Law of Nations as an effective code of international conduct."[1]

Self-defence under the Charter.—The right of self-defence inherent in every State has been clearly recognised by the Charter of the United Nations. Article 51 of the Charter expressly prescribes the inherent right of individual or collective self-defence in case an armed attack occurs against a Member of the United Nations. According to this article the right of self-defence can be exercised until the Security Council has taken measures necessary for the maintenance of international peace and security. It is furthur required by the Article that measures taken by the Members in exercise of the right of self-defence shall be reported to the Security Council. It will be noted that this Article does not declare the existence of an absolute right of self-defence. It merely permits the exercise of the right of self-defence individually or collectively only in case of an armed attack against a Member for a time until the Security Council chooses to intervene. The essential condition for the exercise of the right of self-defence is the occurence of an armed attack against a Member. The expression 'armed attack' is not defined and whether or not this essential condition is satisfied is to be determined by the State or States concerned and the Security Council. The other important condition is that the right of self-defence will be available so long as the Security

1. Oppenheim :—Internationa l Law Page 271.

Council does not intervene. The Security Council has a discretion in the matter and it may not take steps in case it considers that there is no danger to international peace and security. It is possible that the Security Council may disagree with the State or States concerned on the question whether an armed attack occurred against a Member of the United Nations. It will thus appear that the principle of self-defence enunciated by Article 51 is not the same as conceded by the General International Law. Article 51 very much restricts the right of self-defence provided for by the rules of International Law. The effect of this Article is that Members of the United Nations can exercise the right of self-defence only when an armed attack occurs against them. The Members of the United Nations cannot exercise the wider right of self-defence available under the general International Law.

Article 51 of the Charter introduces the right of collective self-defence. In case an armed attack occurs against a Member, States are permitted to combine for the purpose of repelling the armed attack. The combination of a number of States for the purpose of defending a Member against an armed attack has the effect of minimizing the chances of disturbance of international peace and security and is an improvement in the method of self-defence. The system of collective self-defence has found favour with nations and there have come into existence a number of treaties binding States to an action in exercise of a right of collective self-defence. The Inter American Treaty of Reciprocal Assistance (1947) signed at Rio de Janerio on September 2, 1947 aims at organizing collective self-defence. The other treaties providing for collective self-defence are: North Atlantic Defence Treaty of Washington (1949), Western European Treaty for Collaboration and Collective Self-defence (1948), the Bajota Charter of the Organization of American States (1948); the North Atlantic Treaty (1949); the New European Defence Plan (1954); the South East Asian Treaty (1954); and the Warsaw Treaty (1955). These various treaties have been arrived at in furtherance of the object envisaged by Aricle 51 of the Charter.

Collective self-defence and Korea.—The war in Korea (1950) put the machinery of collective security of the United Nations to a severe test. After the surrender of Japan the United States and the Soviet Russia occupied the Korean trritory. The 38th paralell was the artificial dividing line between the territories occupied by the United States and those

occupied by the Soviet Russia. A Joint Commission was under the Moscow Agreement of 1945, set up for the purpose of establishing a Provisional Korean Democratic Government. The Joint Commission was also required to work out a system of trusteeship of the Soviet Russia, China, United Kingdom and the United States of America over Korea, for a period upto five years. As the Joint Commission failed in its negotiations the United States of America referred the matter to the United Nations. The General Assembly on November 14, 1947 set up a Temporary Commission in Korea of nine Member States for bringing about a National Government of Korea by means of duly elected Korean representatives, and for providing an early withdrawal of occupation forces. Inspite of the obstructive attitude taken by the Soviet Russia two separate Governments, one in North Korea and the other in south Korea came to be established in 1948. The Assembly recognised the Government of South Korea as lawful and recommended the withdrawal of the forces of the occupants from Korea. It also set up a Commission of seven Member States for the purpose of using their good offices to bring about an unification of North and South Korea. This Commission in July 1949 reported that it so far failed to bring about the desired unification and that without an agreement between the Soviet Russia and the United States of America the unification was not possible. The Assembly continued the Commission inspite of the proposal of the Soviet Russia for its termination. The Commission was asked to watch and report the developments in Korea. In June 1950 the United States of America and the Commission informed the Assembly that the North Korean forces had invaded the Republic Government of South Korea. The United States of America complained of this aggression and the Commission reported that this aggressive attack by the North Korean forces was a threat to international peace and security. The Security Council atonce called for immediate cessation of hostilities and withdrawal of troops and assistance of the Members. The hostilities did not cease and the events took a serious turn. The Security Council asked the Members to provide military forces for a joint action against North Korea under the command of the United States.

Sixteen Member States supplied combatant units and the United Nations forces got engaged in warfare. The United Nations forces came in contact in North Korea with Chinese Communist military units. The General Assembly was in-

formed of the intervention of China in the Korean affair. On February 1, 1951 the Assembly holding China guilty of aggression asked the Collective Measures Committee to consider and devise additional measures to meet the aggression. China did not pay any heed and went on fighting till truce negotiations began in July 1951. These negotiations lasted for about two years. The Armistice Agreement was signed on July 27, 1953 and the hostilities ceased.

CHAPTER XXIII

EXTRADITION

Legal basis and Definitions.—In exercise of its territorial supremacy a State has a right to punish an individual who has committed a crime in violation of its laws on its territory. It sometimes happens that the offender in order to escape punishment goes and takes shelter in the territory of a neighbouring State. Since the State on the territory of which the offence was committed cannot exercise any jurisdiction over the territory of the neighbouring State which has given asylum to the offender, it is necessary that the offender should be brought back to the territory where he committed the offence to receive the punishment and here arises the question of extradition. Extradition is conditioned upon a common desire of States to maintain law and order and to administer justice. It renders possible for a State to bring back the fugitive criminal to be dealt with according to law. Extradition is the surrender of an offender by the State into the territory of which the offender has escaped. Well known definitions are :—

Oppenheim.—Extradition is the delivery of an accused or a convicted indivdual to the State on whose territory he is alleged to have committed or to have been convicted of a crime, by the State on whose territory the alleged criminal happens to be.[1]

Starke.—Extradition may be defined as the surrender of a person accused or convicted of a crime by the State in the territory of which he has taken refuge to the State in whose territory the crime has been committed or which has convicted him of the crime.[2] Cheif Justice Fuller in *Terlinden* vs. *Ames*.—

1. Oppenheim—International Law Vol. I. p. 635.
2. J. G. Starke—An Introduction to the International Law p. 224.

Extradition is "the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him demands the surrender."[1]

It is an established principle of International Law that no right to extradition exists apart from treaty. In modern times with quick means of communication and transportation every State feels the necessity of entering into extradition treaties with other States. The question whether extradition will take place in a particular case has to be decided on the terms and conditions laid down in the treaty. Although sometimes extradition takes place on the basis of international comity in the absence of a treaty providing for extradition a State has no right to demand extradition on the mere basis of comity. There are no rules of customary International Law which impose an obligation on States to allow extradition. It is for the States to enter into treaties among themselves for the purpose of extradition. Such treaties are bilateral in their nature and provide for conditions under which extradition can take place.

Conditions, procedure and formalities of Extradition.—Extradition takes place on the request of the State which requires the surrender to it of the fugitive offender. This request is generally made through diplomatic channels to the foreign State to which the offender has escaped. The two conditions necessary for a request for extradition are, firstly, that the person sought to be extradited must be extraditable and secondly, that the crime of which that person is alleged to be guilty must be one that is extraditable. That a person is extraditable is determined by the laws and the practice of each State. Some States like France and Italy do not surrender their own nationals while others like great Britain and the United States as a general rule allow extradition of their nationals on the ground that the State on the territory on which the crime has been committed is eminently competent to try the offender. The second condition is satisfied if the offence which the person sought to be extradited is alleged to have committed is one which is extraditable. As a general rule political offences, military offences and religious offences are not extraditable. The formalities laid down in extradition treaties have to be gone into before the offender is extradited. Extradition without formalities some times leads to an intricate situation

1. 184 U. S. 270.

like the one which arose in the well known case of *France* vs. *Great Britain* concerning Savarkar.[1] In this case Savarkar an Indian British subject who was being taken to India in a vessel named Morea for the purpose of being tried there for high treason and abetment of murder escaped on October 25, 1910 when the vessel was in the harbour of Marseilles. He was taken in custody by the French police and was returned to Morea. Since no extradition formalities had been gone into in this case the French Government asked Great Britain to give Savarkar back to it. Great Britain refused and by agreement of the parties the question was referred to the Court of Arbitration at the Hague. The Court held that International Law did not impose any obligation in such a case on a State which has the custody of the prisoner to resurrender the prisoner on the ground that the original extradition was made without necessary formalities and that Great Britain was not bound to hand over Savarkar back to France.

Since extradition depends on the terms of a particular treaty the State demanding extradition is under an obligation to comply with the terms of the treaty with regard to the trial of the offender. The extradited individual can not be tried for an offence other than that for which he was extradited. He cannot also be tried for an offence which is not an extraditable offence according to the extradition treaty. If the State to which the offender is surrendered tries him for an offence other than that for which extradition was granted or for an offence which is not an extraditable offence under the treaty, the extraditing State has a right to complain. The Supreme Court of the United States in the case of *United States* vs. *Rouscher* ordered the release of a prisoner who had been extradited from Great Britain for an offence of murder but who had been tried for another offence which was not extraditable under the terms of the extradition treaty.[2]

Many States have their own Municipal Laws which lay down terms on which extradition may take place. These States generally conclude extradition treaties on the line of their Municipal Laws so as to avoid a coflict between their extradition laws and the extradition treaties. Many States follow the rule that extradition can take place only when the offence for which extradition is asked for is also an offence according to the laws of the extraditing State. This

1. Scott. Hague Court Reports p. 276 : Hudson Cases, 1038.
2. 119 U. S. 407 (1886).

rule was not however followed in the case of *Factor* vs. *Laubenheimer* where the United States Supreme Court held that although *Factor* was not punishable by the laws of Illinois for an act which was an offence under the laws of Great Britain, he must under the terms of the treaty be extradited.[1]

"A lack of uniformity exists in the matter of the request for the extradition of the citizens of the State of refuge. A number of Roman Law countries tend to refuse extradition of their own citizens and prefer that they be tried, if at all, by their own courts. Common Law countries, following the principle that offences are to be tried where they occur, have at times, but not consistently, extradited their own nationals."[2]

The Montevideo Convention of 1933 laid down that offences for which a minimum penalty of imprisonment for one year might be imposed were extraditable offences. The Harvand Research Draft Convention on Extradition proposes the rule that extraditable offences are those "for which the law of the requesting State, in force when the act was committed, provides a possible penalty of death or deprivation of liberty for a period of two years or more and for which the law in force in the State on the territory of which the offender was arrested provides a similar penalty applicable if the act had been committed there."

Extradition for political offences.—As a general rule extradition does not take place for political offences. This rule was necessitated by the general political upheaval that shook Europe in the nineteenth century. This rule is simple but its application is rather difficult on account of the absence of any unanimity among jurists and States about the meaning of term 'Political Offence.' Some writers maintain that a crime is political if it was committed with a political motive; other writers call a crime political if it was committed for a political purpose. There are some writers who consider that a crime is political if it is committed both with a political motive and for a political purpose. So far nothing has been done to formulate a definition of the term 'political crime'. Great difficulty arises when the crime besides being an ordinary crime has a political colour. There are some writers who deny that such crimes are political crimes but there are

1. 290 U. S. 276 (1933).

2. Gould : An Introduction to International Law p. 453.

others who maintain that an ordinary crime may by a political crime being committed for a political objective.

According to British practice the principle is that "in order to constitute an offence of a political character there must be two or more parties in the State each seeking to impose the government of their own choice on the other."[1]

The same principle was laid down in *Re Castioni* where a Swiss who having taken part in a revolutionary movement in the Canton of Ticino had shot a Government official was not extradited on the ground that the crime against the individual was a political one.[2]

In this case the Court in giving meaning to the expression 'crime of a political character' considered the definition of John Stuart Mill who described it as any act which takes place in the course of a political rising without reference to the object and intention of itand other circumstances connected with it unacceptable. It preferred to follow Stephen J. who in his History of the Criminal Law of England observed that a crime of political character was one which was incidental to and formed part of political disturbances.

Re-Kolczynski and other's.[3]—The case of *Re Castioni* was, however, not followed in a recent decision in the case of Re-Kolczynski and others. The facts of this case were that seven Polish Sailors who were members of the crew of the Polish fishing trawler Puszczyk. They landed at Whitby from the trawler and asked for political asylum. They were detained under the Aliens Order 1953. The Polish Government issued warrants for their provisional arrest on certain charges punishable under the Polish Criminal Code. The Polish Government in persuance of an extradition treaty between the United Kingdom and Poland requested the surrender of these persons for certain specific extradition offences *viz*, false imprisonment, unlawful wounding, and revolt against the master of the ship on the high seas. It was proved that all the acts done by these persons were solely with the object of leaving their country and that an attempt by a Pole to leave his country constituted an offence of treason. The question that arose in this case was whether these persons were guilty of a political offence and whether they could be extradited. The expression "offence of a political character" came in for interpretation. Cassels J took the view that the expression "offence of a political character" must always be

1. Re Meunier (1894) 2 Q. B. 415.
2. (1891) 1 Q, B. 149.
3. 1955 All. E. R. Vol. I (Q, B. D.) p. 31.

construed according to the circumstances existing at the time when extradition is requested and that the present time (1954) was very much different from 1890 when *Castioni's* case was decided. He observed: "Now a State of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this case the members of the crew of a small trawler engaging in fishing were under political supervision. The applicants revolted by the only means open to them. They committed an offence of a political character and if they were surrendered there could be no doubt that while they would be tried for the particular offence mentioned, they would be punished as for a political crime." This case lays emphasis on the fact that the character of the offence is to be judged on the political conditions of a particular period. An offence which is of a political character today may not be such a century hence and the interpretation of this expression would vary with times.

In the case of *Re Government of India and Mubarak Ali Ahmad*[1] the question of an offence of a political character was raised but no decision defining the true import of the expression was given.

"Absence of opposition to a Government, together with resultant oppression, may convert a Common Law crime into a political offence if committed in an attempt to escape the oppressive regime. In the case of *Kavic, Bjelanovicet Arsenijevic* (1952) the Public Law Chamber of the Swiss Federal Tribunal refused the request of Tito's Government for the extradition of three members of the crew of a Yugoslav airliner who flew their plane from Ljubljana to Switzerland instead of to Belgrade as scheduled."[2]

The institute of International Law meeting at Oxford in 1880 in their attempt to codify the whole law bearing upon extradition adopted rules with regard to political offence which were not extradtaible. These rules were modified in 1892 and it was provided that not only purely political offences but also political offences of a mixed type unless they were 'of great gravity from the point of view of morality and of common law' could not be extradited. Acts committed during a civil war unless they were acts of odius barbarity or vandalism forbidden by the laws of war were not extraditable.

Attentat Glause.—The rule that there can be no extradition for political crimes is however subject to the so called

1. 1952. All. E. R. Vol. I p. 1060.
2. Gould : An Introduction to International Law p. 454.

attentat clause which provides that murder or attempt to murder the head of a State or a member of his family is not to be considered a political crime. This attentat clause was for the first time introduced by Belgium in 1856 after the Jacquin episode of an attempt on the life of Napolean III. The United States also on the assassination of President Garfield adopted the same attentat clause providing that murder or attempt to murder the head of a State or any member of his family will not be considered to be a political offence. The Montevideo Convention on Extradition of 1933 reaffirmed this attentat clause and laid down that an attempt against the life or person of the Chief of State or members of his family was not a political offence.

A unique case of extradition arose after the close of the First World War when under the terms of the Treaty of Varsailles the Supreme Council representing the Allied and Associated Powers made a request to Holland 'to deliver into their hands William Hohen Zollern, former Emperor of Germany, in order that he may be put on trial.' The Dutch Government did not comply with this request on the grounds that Holland not being a party to the Treaty of Varsailles was not bound to surrender the Emperor and that in view of the age-long tradition according to which Holland had been a land of refuge for the vanquished in international conflicts it was not prepared to extradite the Emperor. No occasion for extradition arose at the conclusion of the Second World War, although the Allied Powers had declared at the Mascow Conference that they would pursue the guilty persons "to the uttermost ends of the earth and would deliver them to their accusers in order that justice may be done." The offenders were captured in belligerent territory and were put up for trial.

"In respect to lsser offenders of various types Belgium, for example, has permitted extradition for war time offences against the safety of the State. In contrast, the Supreme Federal Court of Brazil in 1948 followed the Procurator-General's opinion that certain persons wanted by Norway for membership in an organization guilty of war crimes, could not be extradited because the offences were political in nature."[1]

Extradition of Nationals.—As already stated some States do not as matter of practice extradite their own nationals. These States maintain that if the act for which extradition is demanded is an offence under their own laws, they are

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1- Gould,: An Inrtoduction to International Law p. 455.

strong enough to punish their national guilty of the offence and that it is not necessary to surrender him to another State for something which they themselves can do. Italy and France do not surrender their nationals. Great Britain and the United States following the principle that courts of the territory where the offence was committed are alone competent to try the offender, grant extradition of their own nationals, for they think that if the offender is not extradited he cannot be tried by their courts and would thus escape punishment.

It is obvious that there can be no reciprocity between States which permit extradition of their nationals and those which do not. The question of reciprocity was raised in the case of *Charlton* vs. *Kelly* in which the extradition of an American citizen who after having murdered his wife in Italy escaped to the United States was asked for. The extradition of the criminal who opposed on the ground that in asmuch Italy followed the practice of refusing extradition of its own nationals, the United States was not bound to extradite its national and the treaty of extradition existing between the two countries not requiring extradition of nationals lacked in mutuality and stood abrogated. The Supreme Court of the United States allowed extradition on the ground that it was not possible under the American Criminal Law to try the offender in this country. In a later case however the United States refused to extradite its national on the request of Mexico on the ground that it was not bound by the extradition treaty which lacked mutuality.

The Montevideo Conference of 1933 lays down that a State is free to decide whether it would extradite its own notionals and that if it refuses to permit extradition of its nationols it is bound under certain circumstances to try the offender for the offence of which he has been accused. The Harvan Research Draft Convention on Extradition provides that a State shall not refuse to extradite its national and that if it does it is bound to try its national for the offence which is alleged to have been committed by him abroad.

Letters Rogatory.—These are letters wherein a court of one State makes a request to the court of another State to compel a person within its jurisdiction to appear and give his testimony before the requesting court in a case pending before it. These letters are complied with on the ground that their compliance is in furtherance of the cause of justice and promotes judicial cooperation. *Letters Rogatory* contain a promise of reciprocity.

Extradition in India.—During the British rule in India a number of States belonging to Ruling Chiefs, Rajas and Maharajas existed and although the British Government exercised its paramountcy over these States they were independent in their internal affairs. These Indian States were really under the suzerainty of the British Government and were not at all independent with regard to their external affairs. Before India attained independence from British rule extradition from and to Indian States largely rested on extradition treaties concluded between the British Government and the Rulers of the States. A number of extradition treaties were executed. Extradition was based on a system of strict reciprocity. Most of the treaties of extradition concluded between the Indian States and the British Government contained a list of extraditable offences and provided that neither party was bound to surrender any person who was not a subject of the Government making the requisition. These treaties further provided that in case of doubtful nationality of the peason sought to be extradited either party was to allow extradition to the other. These treaties were terminable by either party after notice had been given to the other. The British Government also demanded extradition in the exercise of its paramountcy, from States which had not entered into extradition treaties with it.

The law and procedure relating to extradition is contained in the Indian Extradition Act of 1903 which substantially follows the provisions of the English Extradition Act (1870, 1935). This Act was drafted on the assumption that Native States in India were not foreign States within the meaning of English Extradition Act of 1870. Chapter III of the Indian Extradition Act relates to the surrender of fugitive criminals of States other than foreign States.

The Indian Independence Act of 1947 by which India and Pakistan came into existence provided that the suzerainty of His Majesty over Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States. After the passing of the Indian Independence Act all the Native States entered into standstill agreements with the Indian Government. These standstill agreements provided for the continuance of all agreements and administrative arrangements as to matters of common concern existing between the Crown and any Indian State until new agreements in that behalf have been made. Later on all the Native States acceded to

the Indian Dominion and became an integral part of the Indian federation.

Case of Dr. Ram Babu Saksena.

The case of *Dr. Ram Babu Saksena* v. *The State*, decided by the Supreme Court of India is important inasmuch as it deals with the effect of accession of the Native States to the Indian Dominion on the previous extradition treaties concluded between the British Government and the Native States. Dr. Ram Babu Saksena, a resident of the Uttar Pradesh was a member of the U. P. Executive Civil Service. In 1948 he was appointed Administrator of the Tonk State where a dispute with regard to succession to the rulership was going on. This dispute was later on settled and Nawab Ismail Khan was recognised as the Ruler of Tonk. Dr. Ram Babu Saksena was appointed a Dewan of that State and Vice-President of the State Council. On the 1st May 1948, the Tonk State merged into the State of Rajasthan. Dr. Ram Babu Saksena was then appointed Chief Executive Officer at Tonk under the Rajasthan Government. Later on, he was appointed Special Officer to Rajsthan Government at Udaipur, Under a warrant of arrest issued by the Regional Commissioner of the Rajasthan Government under section 7 of the Indian Extradition Act of 1903 addressed to the District Magistrate of Nainital, Dr. Ram Babu Saksena was arrested at Nainital. As described by the warrant Dr. Ram Babu Saksena was released on furnishing bail-bonds. He was directed to appear at Tonk on a particular date. He applied to the High Court of Allahabad under the provisions of section 491 of Criminal Procedure Code on the ground that his arrest was illegal, and he was not bound to surrender himself to the Rajasthan Government. It was alleged against him that he had extorted three lakhs of rupees from the Nawab of Tonk during his Dewanship. This charge was, however, denied by Dr. Ram Babu Saksena who pleaded that the warrant of his arrest was *malafide*. A number of important questions of law arose for the decision of the High Court which held :[1]

(1) 'That the extradition treaty between the Crown and the State of Tonk continued to operate between the Indian Government and Tonk State by virtue of the standstill agreement.

(2) That the treaty of extradition became void and impossible after the extinction of the Tonk State.

(3) That even if it be assumed that the treaty subsists

1. Dr. Ram Babu Saksena V. Rex ; All-India Reporter (Allahabad) p. 342.

> it cannot be said that there is a treaty between the two governments for the extradition of offenders within the meaning of Section 18 of the Extradition Act inasmuch as that section refers to the provisions of any treaty for the Extradition of offenders.'

In the event the application of Dr. Ram Babu Saksena was dismissed.[1]

This matter was, thereafter, taken to the Supreme Court of India which held that the extradition treaty between the British Government and the Tonk State stood abrogated on the merger of the Tonk State in the United State of Rajasthan and that if the treaty subsisted the arrest of Dr. Ram Babu Saksena under section 7 of the Extradition Act was not rendered unlawful by anything contained in the Extradition Treaty of 1869.

CHAPTER XXIV

PIRACY

Piracy in International Law.—In its ordinary sense the term 'Piracy' stands for acts of robbery committed against vessels at Sea. It may be noted that in International Law the term 'Piracy' has now acquired a definite technical meaning. The legal import of the term changed at every stage of the development of International Law. In *re the Piracy Jure Gentium* the Privy Council has noted the various changes in the legal implications of the term which may now be regarded as having a more or less definite meaning in law.[2] The Privy Council observed: "A careful examination of the subject shows a gradual widening of the earlier definitions of 'Piracy' to bring it from time to time more in consonance with situations either not thought of or not in existence when the older juris consults were expressing their opinion." In 1926 the League of Nations for the purpose of codifying the law relating to Piracy appointed a sub-committee of experts. This sub-committee defined the term thus :—

1. Dr. Ram Babu Saksena V. The State All-India Reporter 1950 (Supreme Court) p. 155.

2. (1934) A. C. 586 : A. I. R. (1934) P. C. 220.

"According to International Law piracy consists in sailing on the seas for private ends without authorisation from the government of any State with the object of committing depredations upon property or acts of violence against persons."

The above definition of piracy shows that unauthorised acts of depredations against property and unauthorised acts of violence against persons committed on open sea by vessels constitute piracy. *Oppenheim* keeping in view the practice of States and the opinions of other jurists frames the following definition of the term :—

"...........piracy must be defined as every unauthorised act of violence against persons or goods committed on the open sea whether by a private vessel against another vessel or by the mutinous crew or passengers against their own Vessel".[1]

It may thus be stated that the essential ingredients of an act of piracy are :—

(1) There must be an unauthorised act of violence against person or property.

(2) It must be committed on the open sea.

(3) It must be committed either by a private vessel against another vessel, or

(4) By the mutinous crew or passengers against their own vessel.

Let us now consider the above essential, in greater details.

1. Unauthorised act of violence against person or property.—An act of piracy must be wrongful act of violence either against person or property or both. An actual attack or mere threat of an attack on the vessel or its crew and passengers will amount to an act of violence. Demand of delivery of goods and cargo by holding out threats of a murderous attack on the crew or passengers is a piratical act. It is not necessary that the contemplated act of violence should have been done. An attempt to commit the act of violence will be enough. The Privy Council in *re Piracy Jure Gentium* held that 'actual robbery is not an essential element in the crime of *piracy jure gentium* and that a frustrated attempt to commit pira-

1. Oppenheim—International Law Vol. 1 p. 559.

tical robbery is equally *piracy jure gentium*"[1]. Thus an actual attack or merely chasing a vessel for an actual attack will amount to piracy. In the well-known case of Ambrose Light it was held that an armed vessel sailing on the sea in suspicious circumstances without actually committing any act of violence may be a pirate and may be seized.[2]

2. Act of violence to be committed on open sea.—In order that an act of violence may amount to piracy it must be committed on the open sea. An act of violence committed elsewhere is not piracy. An act of violence committed in territorial waters of a State cannot amount to piracy under International Law.

3. To be committed by private vessel against another vessel. It is only a private vessel that can commit piracy. A public ship so long as it sails at the direction of its State Government cannot be regarded under International Law to be a pirate and if it commits any act of violence, redress may be asked for through diplomatic channels. But if a public ship in distinct disregard of the orders of its State Government takes up an independent position its acts of violence would be piratical and its position will be deemed to be that of a private vessel.

An armed private vessel commissioned by a belligerent to seize and plunder enemy ship is called a privateer. A privateer so long as it operates against enemy vessels of the State commissioning it is not a pirate but if it commits acts of violence against other vessels it becomes a pirate. A neutral vessel operating under the commissions of both the belligerents will assume the character of a pirate and its acts of violence will be piratical under the law. Further if a neutral vessel without any commission from either of the belligerents commits acts of violence on the open sea on the vessels of one of the belligerents or on the vessels of any other State it will be held to be committing acts of piracy. A privateer having knowledge of the fact of the termination of the war is not entitled to commit acts of violence and if it does, it commits piracy. On the other hand, if it has no information of the conclusion of war and commits acts of violence it cannot be regarded a pirate as held in the case of *Shenandoah* where the British Government refused to hold a vessel which had committed acts of violence after the termination of the American Civil War in ignorance of the fact of termination a pirate.[3]

1. (1934) A. C. 586. A. I. R. 1934 P. C. 220.
2. Case of the Ambrose Light 25 Federal 408.
3. See Lawrence p. 102.

A privateer commissioned by insurgents who have not been recognised as belligerent power may be regarded as a pirate by the lawful Government. But such a privateer will not be considered a pirate by other States in the absence of an actual act of violence committed by it against vessels of other States. This principle was laid down in the case of *Huascar.*[1] During the civil war in Peru the insurgents seized Huascar and put it to sea where it stopped British vessels, took supply of coal from one of them without payment and also forcibly arrested two Peruvians from another vessel. The vessel was declared to be a pirate and was attacked by the British squadron.

The act of violence must be directed against a vessel which may either be private or public. The object of the act may be to plunder goods or to seize or kill persons on board the vessel.

4. The act may be committed by a mutinous crew or passengers against their own vessel.—The pirate may not be a stranger. Members of the crew and passengers who revolt against the authorities of their own vessel and plunder goods and seize or kill people on board the vessel are pirates under the law. It is necessary that the object of the mutinous crew or passengers should be to appropriate to their own use the vessel or the goods thereon.

Jurisdiction and Municipal Law of Piracy—Piracy as known in International Law is different from that of the Municipal Laws of States Every State has its own laws regarding piracy and it is not necessary that these laws may regard piracy in the same meaning as is assigned to it under International Law. A State is free to frame laws treating as piratical certain acts which can not be regarded as acts of piracy under the International Law. It will, therefore, appear that Municipal Law relating to piracy of the various States may differ as to the meaning assigned to piracy by the International Law. International Law recognises that every State has jurisdiction to punish or deal with a pirate. There is, however, a restriction to the exercise of this jurisdiction in the case of pirates who are foreigners A State can punish pirates only if they are guilty of acts of piracy as understood in International Law But a State is free to punish pirates who are its nationals even though they may not be guilty of acts of piracy as understood in International Law because

1. Pitt Cobbett : Leading Cases on International Law (5th Ed.), p. 299.

the pirates who are nationals are subject to the Municipal Laws of their States. The jurisdiction of every State to punish piracy extends to all acts of piracy which are such according to the International Law.

Some States by their Municipal Laws punish acts which are not technically piratical but which they regard as piratical. "The Municipal Law of different countries may and often does assimilate to piracy *jure gentium* other acts which are not covered by it and may call them piracy (for instance, the act of a crew in revolt against owner or master in seizing and making off with the ship), but they cannot, in respect of such acts committed by foreigners on the high seas, claim the exceptional jurisdiction which applies to piracy *jure gentium*. Further two or more States may by treaty agree to add other acts to the categories of violence at sea covered by piracy *jure gentium* and may agree to exceptional transport provisions with regard to such acts (as for instance slave trading or arms running) but such treaties can only govern the relations of parties to them unless and until by wide acceptance they become of the general law of nations. Moreover in practice the exceptional jurisdiction provisions in such treaties have always fallen short of the provision applicable to piracy *jure gentium*.[1]"

CHAPTER XXV

JURISDICTION OVER PUBLIC AND PRIVATE VESSELS

National Character of Ships—International Law requires vessels in the same way as it requires individuals to have a national character in order to enjoy the benefits that it provides. The flag under which a vessel sails like the nationality of an individual constitutes a legal relationship between the State and the vessel which flies the flag of that State. A vessel without a flag is just like a stateless individual and is not entitled to any protection. International Law makes it incumbent on all States having maritime flags to frame laws regulating the

1. British Year Book of International Law (1938),

use of their flags by the vessels and to require private vessels sailing under their flags to carry with them necessary ship's papers for the purpose of identification. Each State is free to make its own rules and regulations about the use of their flags, the registration of the vessels flying their flags and various ship's papers that the vessels are to carry with them on their voyage. There is no unanimity in the laws and rules of various States on this matter and International Law does not provide for rules in respect thereof. According to *Fenwick* "all that International Law has prescribed is that some one State must authorize the vessel to use its flag, provide it with the proper 'ship'spapers' and thereupon exercise in respect to the vessel the degree of jurisdiction permitted by the law."[1]

The flag determines the national character of the vessel which flies it. According to *Oppenheim* no State can authorize a vessel already flying the flag of another State to use its flag and that a ship with two flags of different States is like a vessel having no flag not entitled to any protection.[2]

Jurisdiction of the Flag State and its basis.—Broadly stated, the relationship between the State and the vessel flying its flag is that the latter are parts of the territory of the former. According to *Oppenheim* it is a customary rule of International Law that men-of-war and other public vessels of a State while on the open sea and in foreign territorial waters are considered to be floating parts of the flag State and that private vessels are considered floating portions of the flag State only in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction and protection of the flag State. The theory which is sometimes known as '*floating Island theory*' received wide acceptance as the basis of the jurisdiction of the flag State. It was maintained that the vessel enjoyed exterritoriality on open sea as well as on foreign territorial waters. This fiction of 'exterritoriality' employed to explain away the theoretical basis of the jurisdiction of the flag State over vessels has raised a good deal of controversy. Recent trend of juristic thought is in favour of rejecting this theory simply on the ground that it does not fit in with the totality of relations between the vessel and its flag State. The *fiction of exterritoriality* was rejected by the United States Court in *Cunard Steamship Co*. vs. *Mellon*, wherein it was observed that the jurisdiction of State over vessels sailing under its flag arose ' out of the nationality of the ship as established by her domicile, registry and use of the flag and partakes more

1. Fenwick—International Law (Third Ed.) p. 311.
2. Oppenheim—International Law Vol. I. (Seventh Ed.). p. 548.

of the characteristics of personal rather than of territorial sovereignty.[1] In an earlier case the same court based the immunity of public vessel on an 'implied licence'.[2] The '*floating Island theory*' was pleaded but was rejected in *Chung Chi Chueng* v. *The King* where the Privy Council approved of the view that the immunity of the vessel does not depend upon an objective exterritoriality but on implications of domestic law.[3] It is thus clear that the fiction of exterritoriality is inadequate in its scope and the theory that a vessel is a floating portion of the territory of the flag State cannot be accepted. According to *Fenwick* 'a better basis of jurisdiction might be found in the fact that the jurisdiction of the flag State has been acquiesced in by other States simply as a matter of mutual convenience'.[4]

Prof. *Brierly* rejects the theory thus:—

"It introduces a fiction for the person or thing which is in fact within and not outside the territory ; it implies that jurisdiction and territory always coincide whereas they do so only generally ; and it is misleading because we are tempted to forget that it is only a metaphor and to deduce untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has some immunity from local jurisdiction ; it does not help us to determine the only important question, namely, how far this immunity extends."

Jurisdiction over private vessels.—The jurisdiction which a State exercises over private vessels sailing under its flag while on the open sea is different in many respects from that which it exercises over the vessels while it is on the foreign territorial waters. The vessels while they are on the open sea remain exclusively within the jurisdiction of their flag State. But this exclusive jurisdiction is however subject to the following exceptions recognised under the customary International Law:—

(*i*) A belligerent has the right of visit and search of all merchant vessels encountered on the high seas in the enforcement of the rules of contraband and blockade.

1. 262 U. S. 100 (102).

2 The Schooner Exchange v. Mc Faddon, (1812) 7 Cranch 116.

3. (1939) A. C. 160.

4. Fenwick—International Law (Third Ed.) p. 312.

(*ii*) Men-of-War of every State in order to maintain safety on the high seas against piracy have the power to stop and visit any suspicious private vessel though ostensibly sailing under a flag.

(*iii*) Men-of-War of a littoral State has the power to pursue into the open sea, seize and bring back into port for trial any merchant vessel that had violated the law whilst in the territorial water of the littoral State. This right of pursuit or seizure can be exercised either when the vessel is still within territorial waters or has just escaped thence. No vessel can however be pursued when it has entered the territorial waters of another State.

(*iv*) Men-of-War of every State have the right to seize and to bring back to the port every vessel sailing under the flag of another State.

The position, however, is different in case of vessels while they are in the port or territorial waters of a foreign State. The territorial supremacy of a State over vessel flying its flag comes into conflict with that of the foreign State in the port or in the territorial waters of which the vessel happens to be. International Law recognises that a vessel when it enters the port or territorial waters of a foreign State subjects itself to the jurisdiction of the foreign State and that the flag State is left with a limited jurisdiction over the vessel. The rule of customary International Law however limits the jurisdiction of the flag State over vessels in ports or territorial waters of a foreign State to matters of internal discipline of the vessel. According to this rule the foreign State can not interfere with the matters of internal discipline of the vessel unless its help is asked for or unless the tranquillity of the port is endangered. Subject to these limitations the vessel while in port or in territorial waters of foreign State is subject to the territorial jurisdiction of the foreign State. The above rule has been adopted generally by States in their treaties and the question that frequently arises is whether a particular interference was justified by such circumstances as disturbed the tranquillity of the port. The attitude of the States with regard to the interpretation of the rule is not uniform. Some States put a narrow construction while others take a broader view. In the case of *Antony*, the Supreme Court of Mexico held that the murder of a Frenchman by another Frenchman on a French vessel in a Mexican port did not disturb the tranquillity of the port. But the Supreme Court of the

United States in the case of *Wildenhus*[1] held that the murder of a Belgian on board of a steamer in the port of Jersey City was such a crime as by its very nature disturbed the tranquillity and public order of the port.[2]

Subject to the limited jurisdiction of the flag State already explained the foreign State exercises territorial supremacy over merchant vessels of flag State in its ports and territorial waters. The consequences which flow from the exercise of such jurisdidiction are as follows :—

(*i*) The citizens of the foreign State in the port of which the vessel happens to be for the time being can file civil actions in *rem* against the merchant vessels.

(*ii*) The officers and the crew of the vessel are subject to the civil jurisdictlon of the foreign State in the port or waters of which the vessel happens to be. The effect of this jurisdiction is that civil actions in *personam* can be filed against officers and crew of the vessel in the courts of the foreign State.

(*iii*) The officers and the crew of the vessel are not exempt from criminal jurisdiction of the foreign State in respect of anything done in violence of the Laws of that State.

(*iv*) The foreign State has no right to interfere with the personal and property rights of the individuals on board the vessel.

It would thus appear that the foreign State of the port or territorial waters has ample jurisdiction over private vessels and in respect of acts done on board the vessel unless its jurisdiction is restricted by the terms of the treaty. The foreign State of the port or territorial waters has a preferential right to exercise its jurisdiction in cases in which an act done by an individual on board the vessel is also within the jurisdiction of the flag State or of the State of which the individual is a subject or both.

These cases of concurrent jurisdiction raise interesting questions as to whether the flag State in exercise of its territorial supremacy or the State to which the individual concerned owes allegiance, in exercise of its personal sup-

1. Hudson Cases 601.
2. Mali v. Keeper of the Common Jail 120 U. S. I.

remacy or the State in port or territorial waters of which the vessel happens to be when the act was committed should exercise jurisdiction. We may note the case of *Regina* vs. *Anderson* in which an American was tried by the British Court for murder committed on board a British vessel in French waters. The court held that "although the prisoner was subject to the American jurisprudence as an American citizen and to the law of France as having committed an offence within the territory of France yet he must also be considered as subject to the jurisdiction of British law which extends to the protection of British vessels though in ports belonging to another country.[1] In another case the *United States* vs. *Santos Flores* where an American citizen committed a crime on board an American vessel in foreign territorial waters the United States Court held that both States had concurrent jurisdiction and the criminal can, if he is present in the United States, be tried by the Courts of the United States.[2]

The Final Act of the Hague Conference of 1930 on the Progressive Codification of International Law.—It laid down the following rules concerning civil and criminal jurisdiction over vessels passing through territorial waters :—

1. A Coastal State may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage save only in the following cases :

(*i*) if cosequences of the crime extend beyond the vessel, or

(*ii*) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea, or

(*i*) if the assistance of the local authorities has been requested by the captain of the vessel or by the consu of the country whose flag the vessel flies.

2. A coastal State may not arrest nor direct foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal State may not levy execution against

1. 11 Cox C. C. 198.
2. 289 U. S. 137 (1933)

or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of its coastal State.

Jurisdiction over Public Vessels.—The position of public vessels is however different inasmuch as they enjoy greater immunities. Public ships may be either warships or vessels engaged in some service of a State. A public vessel need not be owned by the State. A private vessel employed by a State either for its commercial purposes or for governmental activities has a public character and will be a public vessel.

In the famous case of *Chung Chi Chueng* the Privy Council felt no hesitation in rejecting the doctrine of exterritoriality expressed in the words of *Oppenheim* which regards the public ship 'as a floating portion of the flag State' but while admitting that public ships are entitled to certain immunities it did not find it necessary to consider the precise limits of those immunities.[1]

While on the high seas public vessels which are warships or vessels engaged by the State in its governmental services enjoy unrestricted immunity. This immunity is not even subject to the right of other States to visit and search in enforcement of the rules of contraband and blockade.

According to *Fenwick* public warships and their auxiliaries while on foreign territorial waters are completely exempt from local jurisdiction in respect not only to the internal discipline of the ship but even to crimes committed on board the ship by persons not members of the crew or committed in the port itself by one who has taken refuge on board the ship.[2] In case the public vessel grants asylum to a criminal and refuses to surrender him to the local authority the foreign State can avail of the diplomatic means for the redress of the wrong. The public vessel and its crew in foreign ports and territorial waters are immune from ordinary local criminal jurisdiction even if they act in violation of the local laws. The foreign State has only to resort to diplomatic procedure.

The law with regard to civil jurisdiction over public warships in foreign ports has been settled by numerous decisions of English and American Courts. The rule deduced from these

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1. Chung Chi Chueng v. The King. (1939) A. C. 160.
2. Fenwick—International Law. (Third Ed.) p. 320.

decisions is that public warships are exempt from civil jurisdiction of the court of the foreign State within the port or territorial waters of which the warship happens to be. In the case of the French man-of-war Exchange which though owned by an American citizen had been seized by Napoleon in 1810 and commissioned as a public vessel of France, the United States Supreme Court on a thorough examination of the law on the subject took the view that the public character of the vessel exempted it from the civil jurisdiction of the American courts and the American owner of the vessel was not entitled to sue.[1] The British High Court of Admiralty in the case of '*The Constitution*' in which a British Steam—tug instituted proceedings for the issue of warrants against vessel and the cargo on board in order to recover compensation for salvage, refused to exercise jurisdiction on the ground that the vessel was commissioned by the United States and was employed in public service of that State.[2] In another case, *The Parlement Belge* the English Court of Appeals laid down the rule that a publicly owned vessel of the State of Belgium used as a mail-packet as well as for general commercial purposes was exempt from suit in *rem* either for recovery of property or for damages for collision.[3] The immunity that a public ship enjoys has been described by Prof. *Brierly* thus : —

> The immunity of a public ship................means not the total exemption from the local law but rather that if she violates that law the only proper redress is through diplomatic action and not by judicial process or police action against the ship.[4]

There is a divergence of opinion as regards the position of the officers and the crew of men of war in foreign port. Some writers maintain that when officers and crew go on foreign shore to discharge some duty in connection with the public vessel their acts on the foreign shore at that time being official in character are not subject to the jurisdiction of the authorities of the foreign shore but if they go on shore for their private business and commit some act they are not exempt from local jurisdiction. There are writers who do not accept this proposition of law.

Public Commercial Vessels.—The immunity that the public vessels which are engaged in commercial activities of the State claim to enjoy is controversial. According to one view com-

1. The 'Exchange' v. McFaddon. (1812) 7 Cranch 116.
2. The Constitution L. R. 4 P. D. 39.
3. The Parlement Belge L. R. 5 P. D. 197.
4. Brierly—The Law of Nations. (Third Ed.) p. 146.

mercial activities conducive to the economic welfare of a State are no less important than ordinary governmental activities of a State and the vessels which are employed in the commerce of a State are in the same position as other kinds of public vessels and are entitled to all the immunities of warships and other vessels employed in governmental service of the State. This view that public trading vessels are as immune from foreign jurisdiction while in foreign ports and territorial waters as other public vessels is supported by the well known decisions of American and British Courts.[1]

Although in a later case Lord Maugham observed that it was "high time steps were taken to put an end to a state of things which in addition to being analogous is most unjust to our own nationals."[2] The other view is that commercial activities are incompatible with the dignity of a State and that the territorial supremacy of the foreign State should not be restricted in favour of such vessels in preference to privately owned trading vessels. Some States like Italy do not concede immunity to these public trading vessels.

Various conferences met to lay down uniform rules with regard to the question of immunity of public trading vessels. Finally in 1926 twenty-one States including Great Britain signed at Brussels a convention for the unification of certain Rules relating to the Immunity of State-owned vessels which came into force in 1937. This convention laid down that with the exeption of Warships, Government Patrol vessels and hospital ships used exclusively for Governmental and non-commercial services, sea-going vessels owned or operated by States and cargoes owned by States should be subject to the same rules of liability and to same obligations as those applicable to private vessels, cargoes and equipment.

Jurisdiction in Cases of Collision.—In spite of the two Conventions adopted at the Brussels Conference of 1910 by all the maritime States of Europe, the United States and most of the States of South America with respect to matters connected with collision and salvage at sea the rule as to which court has jurisdiction in collision cases is not uniform. On the high seas jurisdtction depends upon the flag and there is no doubt that an action against the guilty ship can be filed in the courts of the State of guilty ship. But while many leading States claim-

1. Porto Alexandre (1920) p. 30 ; Parlement Belge (1880) 5 P. D. , 197 ; Contitution (1874) 4 P. D. 39 : Maipo (1918) 252 F 627 and (1919) 259 F 367; Pesaro (1926) 271 U. S. 562.

2. The Cristina (1938) A. C. 485 at p. 521.

jurisdiction in cases of collision over vessels with foreign flags, others do not. Great Britain follows the practice of assuming jurisdiction over all vessels which happen to be in the British port at the time when action is brought, both irrespective of the flag carried by the innocent and the guilty vessel.

The United States follow the same rule as the Great Britain. The courts of these two leading Powers regard the matter *communis juris* so that all maritime States can exercise jurisdiction over collision cases.

France.—Claims jurisdiction with the consent of both the ships in case the innocent and guilty fly a foreign flag. It also exercises jurisdiction in cases in which the innocent damaged ship flies the French flag.

Italy:—Claims jurisdiction even if both the ships are foreign provided that either an Italian port was the nearest from the place where collision took place or the damaged ship on account of collision had to remain in an Italian port.

There is lack of uniformity in the rules of various big States on the question of jurisdiction in cases in which either of the vessel flies a foreign flag or in which both the vessels fly foreign flags. The leading case relating to jurisdiction is that of the '*Lotus*' which was decided by Permanent Court of International Justice in 1927.[1] A collision between the French steamship Lotus and a Turkish ship Boz-Kourt occurred on the open sea. As a result of this collision the Turkish steamship was lost and eight Turkish subjects died. On the arrival of the French steamship 'Lotus' at Constantinople the Turkish Government took criminal proceedings both against the captain of the Turkish vessel and the French officer of the Lotus both of whom were sentenced to imprisonment. The French Government made a grievance on the ground that Turkey had no jurisdiction inasmuch as the act was committed on the open sea and that it was the flag State which had jurisdiction. Both the States agreed to refer the matter to the Permanent Court of International Justice. That Court held that Turkey had not acted in conflict with the principles of International Law "because the act committed on board the Lotus produced its effects on board the Boz-Kourt under the Turkish flag and therefore on the Turkish territory giving Turkish Court jurisdiction." The Court observed that International Law did not prohibit a State from exercising its jurisdiction over a foreigner for an act done outside its territory and that 'the territoriality of

1. (1927) P. C. I. J. Series A No. 10.

criminal law...............is not an absolute principle of International Law and by no means coincides with territorial sovereignty."

Jurisdiction in Salvage Cases.—Many leading States treat cases relating to claims for salvage in the same way as collision cases and assume jurisdiction over the matters irrespective of the nationality of the claimant ship or the vessel against which the claim for salvage is laid. These States consider that such cases are decided on the well-known principles of equity. The British Court of Admiralty in 1790 entertained a claim made by some British subjects against an American vessel which had been rescued by them from the French. The court held that salvage was a question of *jus gentium* and observed that no country should reasonably distrust the court of another country in the decision of such a case.[1] The Supreme Court of the United States in a case of salvage brought by a British ship against a French ship held that "where such controversies are *communis juris* *i. e.* where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction over the ship or party charged.[2]

CHAPTER XXVI

DIPLOMATIC AGENTS

Right of legation.—The right of legation or the right o representation is the right of a State to receive and send diplomatic envoys. The active right of legation means the right of a State to send its diplomatic envoy to another State. The passive right of legation is the right to receive a diplomatic envoy of another State. A State which sends and also receives diplomatic envoys exercises both the active and passive right of legation.

It is not possible for any State under the modern conditions of International life to refuse to send its envoys to other States either permanently or temporarily and although there is no rule of International Law which obliges a State

1. Case of the 'Two Friends' I. C. Rob. 271.

2. Mason v. Le Blairean 2 Cranch 240 (1804).

to send its diplomatic envoys abroad the States in their own interests do generally send their envoys for various purposes. "Arguing from accepted general principles the very existence of a community of nations would seem to present the necessity of intercourse among its members. So that by inference one State must when the occasion calls for it have the right to send their agents to another State and must be under the duty of receiving agents sent by other States under similar circumstances."[1] According to *Kelsen* each community which is a State in the sense of International Law has the active and passive right of legation.[2] *Oppenheim* maintains that the exercise of active right of legation and of the passive right of legation with regard to permanent envoys is discretionary.[3]

The right of legation belongs to full Sovereign States and to the United Nations. Whether or not member-State of a Federal State have right of legation is to be determined on the provisions of the Constitution of the Federal State. The British self-governing Dominions have a right of legation.

Classes of diplomatic agents.—The classification of diplomatic agents according to rank and honour has been necessitated by the frequent disputes indulged in by various States on the question of precedence in diplomatic rank. Questions of prestige being by their nature difficult to be solved the States often differed as to the order of precedence in the three kinds of diplomatic agents namely the Ambassadors, Ministers Plenipotentiaries and Residents that existed before 1815. The Powers assembled at Vienna Congress in 1815 in order to settle the controversy regarding precedence divided diplomatic agents into three classes in order of rank :—

1. Ambassadors, Legates or Nuncios.
2. Ministers, Plenipotentiary, and Envoys Extraordinary.
3. Charge d' Affairs.

This classification according to rank was, however, slightly disturbed in 1818 by the Congress of Aix-la-Chapelle which introduced another class namely Ministers Resident to rank between the Ministers Plenipotentiary and Charge d' Affairs.

1. Fenwick—International Law (Third Edition) p. 461.
2. Hans Kelsen—Principles of International Law p. 231.
3. Oppenheim—International Law (Seventh Edition) p. 691-692.

This classification has been maintained till today so that we find the following classes of diplomatic agents that are accredited to States :—

1. **Ambassadors.**—These belong to the first class and take precedence of all other envoys. They are accredited by the Holy See, the United Nations and States enjoying royal honours. The ambassadors accredited by the Holy See are known as Nancios or Legates. The ambassadors are entitled to claim the title of 'Excellency' and to ask for at all times audience with the heads of the States.

2. **Ministers Plenipotentiary and Envoys Extraordinary.**—These come next in rank to Ambassadors. The Papal Internuncios come within this class. These Ministers Plenipotentiary do not enjoy such honours as are due to Ambassadors. They are not like ambassadors, entitled to ask at all times for an audience with the heads of the States. They have no claim to the title of 'Excellency.' It is only by courtesy that they are called 'Excellency.'

3. **Ministers Resident.**—They are of a rank lower than that of the Ministers Plenipotentiary. They do not enjoy any title even by courtesy.

4. **Charges d' Affairs.**—They are accredited not by the heads of the State like the first three class of diplomatic agents but by the foreign office of the State, which they represent. They rank below Ministers Resident.

Diplomatic Corps —The whole group of all foreign diplomatic agents accredited to a State is technically known as 'Diplomatic Corps.' This is not a body corporate in law. The Papal Nuncio if he is one of the group of diplomatic agents presides over this body. In the absence of Nuncio the oldest ambassador is the head of this Diplomatic Corps. In the absence of ambassadors the diplomatic agent who is highest in rank will preside. The chief function of this 'corps' is to act as guardian of the honour and privileges of the diplomatic agents.

Appointment of Diplomatic Agents.—International Law contains no rules prescribing the qualifications of the persons for appointment as diplomatic agents. On the one hand the States are free in making their choice of diplomatic agents; on the other hand the States to which diplomatic agents are accredited have a right to refuse a certain individual as diplomatic agent without assigning any specific reason for

its refusal. The case of *Mr. Keiley* affords a good illustration of the exercise of this right of refusal. *Mr. Keiley* was accredited by the United States of America to Italy which refused to receive him on the ground that Mr. Keiley had some years before his appointment protested against Italy's annexation of Papal States. Mr. Keiley was then accredited to Austria which also refused to receive him on the ground that Mr. Keiley had a wife who was a Jew. As the accrediting State has no right to demand reception oι a particular individual as diplomatic agent, the United States after protest had to acquiesce in the refusal. The practice that has now grown up is to enquire of the foreign States whether they would accept a particular individual as diplomatic agent. If the foreign States make no objection the proposed individual is accredited to that foreign State. Thereafter the foreign State cannot refuse to receive such an accredited agent.

Letters of Credence.—The document by which the appointment of a permanent envoy is made known to the State to which the envoy is accredited is known as 'Letters of Credence.' The envoy appointed goes to the foreign State to which he is accredited with sealed letters of Credence and also an open copy of it. The envoy announces his arrival by sending copy of the letter of credence to the foreign office of the State. Thereafter he has to present the sealed letter of credence personally to the head of the State to which he has been accredited. Charges d' Affairs also get their letter of credence which is signed not by the head of the State but by foreign office of the State which accredits them. Envoys who are sent on a particular task, for example, the negotiation of a treaty, get their document of authority which is known as 'Full Powers.'

The reception of the envoys of first three classes is accorded by the head of the State to which they are accredited. The Charges d' Affairs are received by the Secretary of Foreign Affairs of the State. It is only after the formal reception that the envoys can begin to perform their functions as diplomatic agents.

Functions of Diplomatic Agents.—Besides those with which a permanent envoy has been specially charged by the State accrediting him there are some regular functions which he must discharge. Some of these regular functions are purely domestic in the sense that they have nothing to do with the State to which the envoy is accredited. There are other

functions which can be discharged with reference to the government of the foreign State. In the discharge of ordinary or special functions a permanent envoy has no right to interfere either by word or deed with internal political affairs of the State to which he has been accredited. He has to keep a silent watch over all that happens within the territory of the foreign State. No interference on his part can be excused by the foreign State. In case of any interference by the envoy the foreign State has a right to demand the recall of the envoy.

The regular functions of an envoy have been grouped by *Oppenheim* under three heads :—Negotiation, Observation and Protection. They may be briefly stated thus :—[1]

1. *Negotiatian.*—A permanent envoy represents his home State in all international dealings not only with the State to which he is accredited but with other States also. He acts as a medium between his home State and the foreign State. He has to make report about all communications that pass between him and the foreign State.

2. *Observation.*—He has to keep a vigilant eye over all that happens in the foreign State and particularly over all that is likely to affect the interests of his home State. He has to report to his home State about all that he has observed.

3. *Protection.*—He has to act as a protector of the person and property of the nationals of his home State who are staying or residing on the territory of the foreign State to which he is accredited. He has to take steps for the redress of the wrong done to the person or property of the nationals of his home State.

Immunities and Privileges of diplomatic agents.—Since time immemorial diplomatic envoys have been regarded sacrosanct. As representatives of a State and its dignity the envoys have always enjoyed special privileges. Their inviolability is necessitated by the nature of the duties that they are required to perform. The ancient Greeks and Romans also recognised the inviolability of diplomatic envoys and had specific rules providing for special protection of the person of the envoy. Further development of the rule as to inviolability of the person of the envoy during a long period of time led to the recognition of certain privileges and

1. Oppenheim—International Law Vol. I (Seventh Edition) pp. 703—704.

immunities to the envoys. International Law gives a right to every State to demand for its envoys all the privileges and immunities recognised by law.

Early writers on International Law employed the fiction of 'exterritoriality' to justify the grant of privileges and immunities to the diplomatic agents. According to them the ambassador along with his suite and residence was to be regarded outside the territory of the State to which he was accredited. *Oppenheim* is of the view that the diplomatic envoys are in reality not outside but within the territory of the receiving State and that exterritoriality is simply a fiction although it is valuable in so far as it clearly demonstrates the fact that envoys must in most respects be treated as though they were not within the territory of the receiving State.[1] According to *Fenwick* exterritoriality 'has been less referred to of recent years; and immunities granted to public ministers are not generally explained as a mere exemption from the local law, based upon the necessity of securing to the minister the fullest freedom in the performance of his official duties.'[2]

The immunities of diplomatic agents are also enjoyed by nationals of the receiving State when employed in the foreign legation. The English and American practice seems to be that employees of a legation both nationals of the recieving State or foreigners enjoy the immunities. Many Countries regard their nationals who are employed in the legation as subject to the Municipal Laws.

The various immunities and privileges enjoyed by diplomatic envoys are :—

1. **Personal Safety.**—Diplomatic agents are entitled to special protection as regards the safety of their persons. This protection is available to the members of their families and their suite and to all that lies within their official residence. International Law takes serious view of any violation of the personal immunity enjoyed by the envoys. Many States have framed laws which severely punish persons acting in violation of this rule of protection. The foreign State to which the diplomatic envoy is accredited has a duty to take immediate steps to prosecute the offender. But International Law does not provide for any protection to an envoy who unnecessarily exposes himself to danger in time of riots.

1. Oppenheim—International Law (Seventh Edition) p. 711.
2. Fenwick—International Law (Third Edition) p. 463.

2. **Immunity from criminal jurisdiction.**—Diplomatic Agents are exempt from criminal jurisdiction of the foreign State. The diplomatic envoys can not be prosecuted or punished by the courts of the receiving States. This immunity is enjoyable by them so long as they do not disturb the internal order of that State. While International Law grants them immunity from criminal proceedings it also requires the envoys to obey the Municipal Law of the State to which they are accredited. A diplomatic agent conspiring against the State to which he is accredited will lose his immunity temporarily and is liable to be expelled.

3. **Immunity from civil jurisdiction.**—A diplomatic agent is not liable to be sued for a debt or on any other contract or for tort of any kind. Many countries have passed laws which prevent the issue of civil processes against diplomatic envoys. This exemption from civil jurisdiction continues till he leaves the foreign State.

The immunity from civil process is available even when the deplomatic agent incurs liability in respect of his personal business transactions unconnected with his official duties. In the case of the *Magdalena Steam Navigation Company* v. *Martin* (1859) the British Court took the view that the Minister of New Guatemela and New Granada was not liable to be sued upon certain business transactions.[1]

A diplomatic envoy cannot be arrested for his debts. His property also cannot be seized or attached in payment of his debts. He cannot be summoned in the courts of the receiving State as a witness.

There are, however, certain cases in which the envoy loses this immunity from civil jurisdiction. If in a suit filed against him an envoy enters an appearance and does not plead immunity, but allows the case to proceed he cannot afterwards complain of the result of the case on the ground of immunity. Similarly if an envoy himself files a suit in the local courts he cannot plead immunity from processes which ordinarily issue in the proceedings taken by him. Although the English Court of Common Pleas in the case of *Taylor* v. *Best* (1854) held that a diplomatic envoy would be deemed to have waived immunity by allowing the case to proceed through several stages before claiming immunity, the British practice seems to be that even if a suit is allowed to

1. 2 Ellis and Ellis 94.

proceed to judgment against a diplomatic agent the immunity may be claimed after judgment. *Taylor's* case is regarded as an exception to the general rule that the principle of waiver would not apply in cases against diplomatic envoys. In the case of *Dickinson* v. *Del Solar* (1929) where Del Solar, the first Secretary of the Peruvian Legation was sued for damages arising out of a car accident. Del Solar was prohibited by the Minister to plead immunity. The case proceeded and the Court ordered the Insurance Company to pay the plaintiff.[1] An agreement to waive the immunity is ineffectual in law. The sending State is alone competent to waive diplomatic privileges and immunities. In the case of *Montwid-Biallozov* v. *Ivaldi* (1925) the Supreme Court of Poland held that the diplomatic agent is entitled to agree to waive his immunities and an agreement undertaking to waive the privileges and immunities is not valid in law.

4. **Immunity of domicile.**—An immunity also attaches to the official residence of an envoy. In earlier times the official residence was considered to be a part of the territory of the home State and quite immune from the jurisdiction of any court of the State to which the envoy was accredited. This absolute immunity was often abused by making the official residence of the envoy an asylum for all sorts of criminals. This led to protest by the foreign States and to change in juristic thought. The result is that now-a-days official residences of the envoy enjoy only a somewhat restricted form of immunity. No act of jurisdiction or adminstration of the receiving States can be performed within the Official residence of the envoy. The authorities of the receiving States cannot enter the premises of the envoy or the residence of any member of the legation without the consent of the envoy or the member of the legation. The Official residence cannot be converted into a regular asylum for the criminals. It is the duty of the envoy to surrender the criminal to the State on demand. If the criminal is not surrendered the State has the right to have the criminal taken out by force.

5. **Exemption from subpoena as witness.**—A diplomatic envoy cannot be made to appear as witness in any civil, criminal or administrative court of the receiving State. The envoy may waive this privilege by appearing himself as a witness before a court.

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1. (1930) 1 K.B. 376.

But the diplomatic envoy can not waive the privilege without the consent of his Government, as his immunities are in respect of his office.

6. **Exemption from taxation.**—This exemption is partly due to customary International Law and partly due to Comity. International Law exempts envoys from all direct personal taxation such as income tax and the like. As regards rates the rule is that an envoy is exempt from poor rates and the like but he is not exempt from those local rates which are levied on the use of certain local objects. The envoy is also liable for house-tax or other taxes on property. But on the ground of comity the local rates and taxes on property are not generally imposed on the envoys.

7. **Exemption from police regulations.**—An envoy is not subject to local police and he is not bound by the police orders or regulations which interfere with the exercise of his official duties. But in the interest of maintenance of public order of the locality he is expected to obey the police regulations. His disregard of police measures which is likely to disturb local order may result in his recall from that State although he may not be punished.

8. **The right of private chapel.**—A diplomatic envoy has a right to have his private chapel inside his official residence for his religious worship. This right was very invaluable in the past when religious intolerance prevailed. In the present world it has not much significance. The right consists in carrying on religious worship peacefully and silently and does not allow tolling of bells so as to offend the religious susceptibilities of people of other religion.

9. **Right to exercise jurisdiction.**—The Official's residence and the members of the suite of an envoy enjoy exterritoriality as stated above. The jurisdiction of the receiving State being excluded, the envoy has a right to exercise jurisdiction over his retinue. He has a right to arrest a member of his suite and to send him to trial to the home State.

Immunities of envoy's retinue.—The retinue of an envoy consists of: (1) all officials and other servants of the legation, (2) wife and children of the envoy and other members of his family living with him, (3) private servants of the envoy, (4) couriers. The privilege and immunities enjoyed by these four classes of individuals composing the envoy's retinue may be stated separately thus :—

1. **Official and other servants of the legation.**—These are appointed by the home State and are officially a part of the legation. They enjoy the same inviolability and exemptions as are enjoyed by the envoys themselves. They are liable to taxation as held in *Macartney* v. *Garbutt* where a Secretary attached to Chinese legation who was a British subject was allowed exemption from parochial rates.[1]

2. **Relatives of the envoy**—There is no doubt that the wife of the envoy has the same immunities and privileges as the envoy. The children of the envoy as well as other members of his family who live with him, are exempt from civil and criminal jurisdiction.

3. **Private servants of the envoys.**—According to *Oppenheim* the rule is that all persons in the private service of the envoy whether they are subjects of the receiving State or not are exempt from civil and criminal jurisdiction but the envoy may disclaim these exemptions.[2] *Fenwick*, however, states :

> "The immunities granted to persons in the private employment of the minister and his official suite are, however, subject to qualifications. If citizens of the foreign State, they remain amenable to its laws. Otherwise they are exempt from local jurisdiction, but their exemption may be waived by the minister at his discretion."[3]

Couriers or despatch-bearers.—These are officially connected with the embassy and enjoy exemption from civil and criminal jurisdiction and are granted special protection which is necessary for the discharge of their duties of a special character. They are usually granted special passports and have a right of innocent passage through third States.

Immunity of envoy and third State.—The immunities and privileges discussed above are granted by the State to which an envoy is accredited and do not concern a third State. An envoy has no right under the International Law to claim any privilege or immunity from a third State to which he hos not been accredited. Under the International Law he is only entitled to a right of innocent passage through third States if it is not at war with the accrediting or receiving State. In case the third State is at war with the accrediting or receiving

1. L. R. 24 Q. B. 368.
2. Oppenheim : International Law (Seventh Edition) p. 725.
3. Fenwick : International Law (Third Edition) p. 475

State the envoy has no right to claim even an innocent passage and he may be seized and made prisoner of war.

International Law is, however, not clear as to whether envoys of a neutral State accredited to the State the territory of which has been occupied by the enemy enjoy any rights or privileges. According to *Fenwick* they are entitled to their personal immunity and it is doubtful whether they are entitled to other privileges beyond the right to leave the country.[1]

Termination of Diplomatic mission.—The causes leading to the termination of a diplomatic mission are :—

1. **Death of the diplomatic agent.**—On the death of the envoy the mission comes to an end. The letters of credence is a personal document and as soon as the person appointed by it dies the letter of credence loses its legal effect. The succeeding envoy can be appointed by fresh letters of credence. It may be noted that on the death of an envoy the members of his retinue continue to enjoy their privileges so long as they do not leave the foreign territory. Further the receiving State cannot exercise its jurisdiction over the property of the deceased envoy.

2. **Recall of the diplomatic agent.**—There are various grounds for the recall of an envoy. The accrediting State may itself recall its diplomatic agent. The receiving State may demand recall of the envoy accredited on the ground of misconduct. The envoy's resignation or his transfer to some other part may occasion a recall. Lastly, a war between the accrediting State and the receiving State cause the recall and the termination of the mission.

3. **Dismissal of a diplomatic agent.**—Dismissal of an envoy marks an extreme step taken by the receiving State when its demands for the recall of the envoy is either not complied with promptly or refused by the accrediting State. The receiving State if it finds an envoy wholly undesirable can dismiss him if the accrediting State when asked to recall him, either does not recall or refuses to recall.

4. **Breach of diplomatic relations.**—There are many causes which lead to breach of diplomatic relations between the two States. The breach may be due to the change of Government of the receiving State. The change of Government may not be recognised by the accrediting State and there may

1. Fenwick—International Law (Third Ed.) p. 477.

be consequent breach of diplomatic relations. The breach of diplomatic relations may be caused by something done by either of the State in violation of its duty under International Law. In 1923 diplomatic relations between Soviet Russia and Switzerland were broken on the ground of acquittal of a man who was alleged to have murdered a Russian delegate to the Lausanne Conference. Similarly in 1927 there was breach of diplomatic relations between Great Britain and Soviet Russia on the ground of some subversive activities.

5. **Constitutional Changes.**—When the sovereign head of the sending or receiving State dies or abdicates the mission ends. If the mission is to continue fresh *letters* of credence will be required to be issued. According to *Oppenheim* a change in the headship of republic like United States of America and France terminates the diplomatic mission but the death, abdication or expiration of term of the office of the head of republics like Switzerland where a body of persons is considered to be the head has no effect on the mission.[1]

6. **Revolutionary change in the government.**—Changes in the governments of the sending or receiving States brought about by a revolution put an end to diplomatic missions. When a monarchy is converted into a republic by revolution or when a sovereign is deposed and a new sovereign is crowned as a result of a revolution, there is a termination of the mission already established.

7. **Extinction of the State.**—In case of extinction of either the sending or the receiving State the diplomatic mission terminates.

8. **War.**—War leads to rupture of diplomatic relations and the mission terminates on war taking place between the two States.

9. **Request for passport.**—A diplomatic agent may on the ground that he has been illtreated by the receiving State ask for his passport and depart. The request for a passport terminates the mission.

10. **Change in the rank of the diplomatic agent.**—When the accredited diplomatic agent is promoted to higher rank in the legation without being transferred he requires a fresh letter of credence. The promotion terminates the mission.

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1. Oppenheim—International Law Vol. I (Seventh Edition) p. 731-732.

11. Accomplishment of the purpose of the mission.—If a diplomatic agent is accredited for some definite purpose the mission terminates on the accomplishment of that purpose.

12. Expiry of time.—A diplomatic mission established for a certain period of time comes to an end on the expiration of the period.

CHAPTER XXVII

CONSULS

Consuls and their origin.—A consul is not a diplomatic agent but simply an agent whose main function is to protect the commercial interests of his appointing State in foreign countries. Consuls are not representatives of their States and are not accredited to foreign States. They do not enjoy an International status and the duties that they perform are merely domestic. Their position under the conditions of modern International Trade is of great utility and importance.

The earliest traces of consular system are to be found in the Greek City States which used to appoint consuls from among the citizens of foreign States for the settlement of their commercial disputes. In the middle ages among the merchants of Italy, France and Spain a practice of electing one or more of them as Judges, Consuls or Consuls-Merchants to act as arbitrators in commercial disputes grew up.

Later on the Mohammedan countries of the Mediterranean adopted the consular system. Many States entered into treaties known as "Capitulations" for the purpose of defining the functions of these consuls. In course of time consuls in addition to their duties of protecting the commerc al interests of their States began to exercise civil and criminal jurisdiction over their countrymen. The establishment of the system of permanent legation in the seventeenth century lessened the importance of the consular system. Moreover, the juristic thought of that time did not approve of the exercise of civil and criminal jurisdiction by the consuls. The result was that consuls were deprived of their civil and criminal jurisdiction and continued to function as supervisors of commerce

and navigation of their States. With the increase of international trade and navigation in the nineteenth century the European States diverted their attention to the development of the consular system in the interests of their navigation, commerce and industry. Innumerable treaties regulating the character and functions of the consuls came into existence. As time went on the provisions of such treaties came to be more or less uniform and the consular system as at present existing may be said to be based on the Customary International Law.

Kinds and grades of Consuls.—According to *Oppenheim* consuls are of two kinds *viz* ; those who are specially sent and paid for the administration of their consular office and those who are appointed from individuals in most cases merchants residing in the district for which they are to administer the consular office.[1]

The first kind of consuls are always the subjects of the appointing State while the second kind of consuls may or may not be subjects of the State appointing them.

There are no rules of International Law providing for grades of the consuls. It is for the State which appoints to lay down the grades. In many big States a classification according to rank in the consular service is maintained. The British consular service consists of five grades, *viz.* (1) Consuls-General ; (2) Consuls ; (3) Vice-Consuls ; 4) Consular Agents ; and (5) Pro-Consuls.

According to *Oppenheim* there are four grades of consuls. In order of rank they are :—

(1) **Consuls-general.**—These belong to the first rank and are appointed as the head of several consular districts or of one big district.

(2) **Consuls.**—They come next in rank and are deputed to small districts.

(3) **Vice-consuls.**—They act as assistants of the first two grades of consuls. In some States they are appointed by consuls.

(4) **Agents Consular.**—They belong to the lowest rank and are appointed by Consuls-General or Consul

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1. Oppenheim—International Law Vol. I (Seventh Edition) p. 744.

subject to the approval of the home Government. They perform minor consular functions.

Appointment of consuls.—The appointment of consuls is regulated by the Municipal Laws of the States and International Law has no concern with it. Consuls take their appointment through a patent or commission known as *Lettre de provision*. The State to which the Consul is sent admits him by a grant of *Exequatur*. A Consul can not exercise his functions before he has handed over his patent to the foreign State and has received its *exequatur*.

There is no obligation on a State under International Law to admit a Consul and grant *exequatur*. But in practice owing to the importance of commercial interests no modern State refuses to admit a Consul appointed by another State.

Functions of consuls.—The fuctions that consuls are required to perform are regulated primarily by the Municipal Laws of each State. Since these functions very often come into conflict with the jurisdiction of the admitting State practice has grown up among the States to conclude treaties specifying the functions to be discharged by the consul of one State over the territory of another State. The generally recognised functions of a consul are :—

(1) He has to keep a vigilant eye over the commercial interests of appointing State. He has to make reports from time to time about commercial trend and events. He has also to see if commercial treaties existing between the admitting State and the appointing State are given their full effect.

(2) He exercises supervision over the navigation of his State. If he is stationed at a port he has to keep a watch over all merchant-men sailing under the flag of the appointing State, to assist vessels in distress, and to settle disputes between a vessel's master and its passengers.

(3) He has to exercise functions for the protection of the subjects of the appointing State. His protecting functions are of various kinds. He has to assist the subjects of the appointing State in getting passports, helping them in litigation before the court and advising them on various matters.

(4) He exercises notarial powers which consist in attesting signatures, examining witnesses for the courts of the appointing State, authenticating documents and testamentary dispositions of the subjects of the appointing State. He registers marriages of the subjects of the appointing State, legalises their adoptions, registers birth and deaths.

Consular privileges.—As already noticed consuls are not diplomatic representatives of the States. They are mere agents or officers of one State sent to another State for the performance of certain functions. They do not represent their appointing States in the totality of international relations. They cannot, therefore, enjoy those privileges and immunities which are conceded by States to diplomatic agents. But because they have a recognised public character and are custodians of certain material interests of their appointing States on the foreign territory they receive special protection. They do not enjoy immunity from civil and criminal jurisdiction of the receiving States.[1]

Although their privileges and immunity flow from the treaties but it is customary to regard their person and consular offices as possessing a good deal of inviolability. It is also a common rule to exempt them from direct personal taxes such as income tax and from personal appearance as witnesses in a civil court.[2]

Termination of consular office.—The consular office ceases to exist on four grounds :—

(1) Death of consul.

(2) Withdrawal of the *exequatur*.

(3) recall or dismissal of the consul.

(4) War between the sending and receiving State.

It may be noted that a consular office does not terminate on the change in the headship of the appointing or the receiving State.[3]

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1. Viveash v. Becker 3 M & S 284 : Fention Textile Association v. Krassin 38 Times L. R. 259 (1921).
2. Fenwick—International Law. (Third Edition) p. 486.
3. Oppenheim—International Law Vol. I (Seventh Edition) p. 756-757.

CHAPTER XXVIII

TREATIES

Treaties in International Law.—Treaties have their origin in the hoary past; they existed during a time when no such thing as the International Law existed. Treaties furnished a firm foundation for the Law of Nations and they have for the last four hundred years been exercising a great influence on the growth and development of that law. We have already noticed that treaties are an important source of International Law. Apart from being a source of International Law a treaty represents a transaction recognised by law whereby the States create binding obligations between them. The importance of treaties as international agreements calls for a study of the law that has gathered round this subject. For a clear understanding of the whole matter it is necessary to find out what the term 'treaty' implies in law. Some of the well-known writers define a treaty thus :

Oppenheim.—"International treaties are conventions, or contracts, between two or more States concerning various matters of interests."[1]

Kelsen.—"A treaty is an agreement normally entered into by two or more States under general International Law."[2]

"A treaty like a contract, is a leagal transaction by which the contracting parties intend to establish mutual obligations and rights."[3]

Starke.—"A treaty may be defined as an agreement whereby two or more States establish or seek to establish a relationship under International Law between themselves. So long as it attests an agreement between States any instrument or document may be a treaty irrespective of the form with which the text is clothed."[4]

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1. Oppenheim—International Law Vol. I. (Seventh Ed.). p. 791-792.

2. Hans Kelsen—Principles of International Law, p. 317.

3. Hans Kelsen—Principles of International Law, p. 318.

4. J. G. Starke—An Introduction to International Law (Second Ed.) p. 240.

It is clear that a treaty constitutes an agreement which the States for the purpose of regulating their conduct with respect to matters on which the agreement has been reached. It may, however, be borne in mind that every international agreement is not a treaty. There are a number of documents going by different names which evidence agreements between States but which are quite distinct from treaties.

Oppenheim describes some of these documents which are not to be confused with treaties thus :—

(1) *Memoire.*—"A *memoire or memorandum* is a diplomatic note containing a summary exposition of the principal facts of an affair."

(2) *Proposal.*—"A *proposal* is a document comprising an offer submitted by one State to another."

(3) *Note verbal.*—"A *note verbal* is an unsigned containing a summary conversations or of events, and the like."

(4) *Proce's verbal.*—"A *proce's-verbal* is the official record or minutes of the daily proceedings of a conference and of the provisional conclusions arrived at, and is usually signed by representatives of the parties."

(5) *Protocol.*—"The term '*protocol*' is used to denote the same thing as proce's-verbal (which is undesirable) or more correctly, an international agreement itself though usually one of a supplementary nature or of a less formal and important character than a treaty."[1]

International agreements of the nature of treaties have acquired various names which have their own significance in International Law. The various names of these international agreements are Conventions, Protocols, Agreements, Arrangement, Statute, Declarations, Modus Vivendi, Exchange of Notes, Final Acts and General Act. In spite of these names which are used for a treaty in its general sense the term 'Treaty' stands for an international agreement concerning transactions of utmost importance such a peace, alliance and the like. The legal significance of the various forms of the treaties may be stated briefly.

1. Oppenheim—International Law Vol. I (Seventh Ed.) p. 792.

Conventions.—These are either multilateral treaties or agreements arrived at international conferences or international institutions.

Protocol.—It is either an independent treaty of less formal a character than the treaty proper or document of a supplementary nature drawn up for the purpose of interpreting the convention or for some other minor purpose. A protocol is also sometimes a record of certain arrangement arrived at during negotiations.

Arrangement and Agreement.—These are also documents of less formal a nature than the treaty proper and serve a limited purpose. These do not require ratification.

Declaration.—It is either a treaty properly so called or serves as supplementary to the main treaty.

Final Act.—A Final Act is a record of the proceedings of an international conference. It contains the terms of reference, the powers that were represented at the Conference and the result of the deliberations of the Conference. The resolutions, recommendations and declarations of the Conference find a place in the Final Act. Sometimes the rules of interpretation of the provisions adopted at the conference are given in the Final Act. It is signed but does not require to be ratified.[1]

Modus Vivendi.—It is an informal document drawn up provisionally to serve as prelude to some permanent agreements. It needs no ratification.

Exchange of Notes.—It constitutes an arrangement arrived at between diplomatic representatives of the States with regard to certain matters.

General Act.—It is formal or informal treaty e.g. the General Act of Arbitration for the Pacific Settlement of International Disputes.

Bilateral and Multilateral Treaties.—Writers have drawn a distinction between the functions of a bilateral treaty and those of a multilateral treaty. A bilateral treaty is an agreement between two States while a multilateral treaty has more than two States as its parties. It is said that the function of a bilateral treaty is to regulate the conduct of the two contracting parties and that a multilateral treaty discharges the function of legislation and is in effect a law making treaty.

1. J. G. Starke—An Introduction to International Law p. 247.

There is no doubt that some bilateral treaties entered into by the parties have for their object the promotion of some interest common to them and are merely in the nature of private contracts of individuals. But there are other bilateral treaties which according to Fenwick "may take on a wider scope and enter the field which, in Municipal Law, would be occupied by legislative enactments and executive function."[1] Such treaties though not strictly law-making treaties lay down rules of conduct which are good substitutes for a rule of International Law with regard to the particular matter agreed upon in such treaties.

Multilateral treaties are either political or non political and are law-making treaties. These treaties are expressive of the desire of the States which are parties to them to be bound by certain rules on a particular matter. "By contrast with these bilateral treaties, there are two groups of general or multilateral treaties, which have been called law-making treaties and which although differing in many respects from the statutes of municipal law, do in fact express the common will of the parties upon the subjects of the treaty. Certain of these treaties have dealt with the political interests of States and have attempted to adjust conflict of claims by defining rights and duties and laying down new principles of International Law."[2] Notable instances of such treaties are the Pact of Paris, the Covenant of the League of Nations and the Charter of the United Nations.

Kelsen, however, disapproves of the distinction pointed out above between law-making treaties and other treaties for according to him the essential function of any treaty is to make law, that is to say, to create a legal norm, whether a general or an individual norm.[3] "The so called law making treaties are law-making treaties creating individual norms"[4] *Kelsen* further points out that distinction between a political and a non-political treaty is erroneous inasmuch as according to him a treaty, even if concluded for political purposes, is always a legal instrument, and can be interpreted only according to legal principles.

Full Powers and Negotiation.—The first step towards the conclusion of a treaty begins with negotiations. It may, however, be noted that negotiations are generally carried on by the

1. Fenwick—International Law (Second Ed.), p. 428.
2. Fenwick—International Law (Third Ed.) p. 428.
3. Hans Kelsen—Principles of International Law p. 319.
4. Hans Kelsen—Principles of International Law p. 320.

representatives of the States. The representatives before they commence negotiations are to be authorised by their respective States. The instrument by which the representatives are authorised is known as Full Powers which are signed by the head of the State in case the treaty contemplated is one which will be on behalf of the head of the. State, and which are given by ministers of Foreign affairs if the treaty is in another form. In case of bilateral treaties each of the representatives show their Full Powers to the other and negotiations begin. In the case of the multilateral treaties which are concluded in conferences the Full Powers are given to the Committee of Full-Powers which is set up for the purpose of making report about the Full Powers which representatives have brought with them. The Committee of Full Powers scrutinises the Full Powers of each of the representatives and if it discovers that there is anything wanting in authority the representative concerned is asked to get the requisite authority from its State If the Full Powers are found to be adequate the representatives enter upon their task before the Conference.

Negotiations are either through pour-parlers for bilateral treaties or through conferences for multilateral treaties. The representatives in carrying out negotiations follow the instructions contained in the Full Powers or those which are sent to them by the Governments during the course of the negotiationse These negotiations are both formal and informal but the deliberations are made formally in regular sittings. Thl decisions taken at the Conferences are adopted and the fina. draft is then prepared.

Parties competent to make Treaties.—It is evident that contracting parties to a treaty are States. To make a treaty is an incidence of sovereignty and all full sovereign States have unlimited power of making treaties on any matter. States which do not possess full sovereignty or which are not full sovereign States can make treaty only if they are authorised under their Constitution. In a confederation or a federation the right of States to enter into treaties flows from the Constitution. An exception to the rule that only States are competent to make treaties may, however, be pointed out. The Roman Catholic Church which though a community of individuals is not a State but which is an international person is competent to enter into treaties which are called *concordats*.

Sometimes a State enters into a treaty with another State stipulating that it will not make a certain treaty with a third State. Such a stipulation which is recognised by International

Law restricts the treaty-making power of the State and is binding on it. The treaty of 1839 whereby Belgium bound itself to observe neutrality towards all other States had the effect of preventing it from entering into treaty of alliance. Another well-known restriction on the unlimited power of making treaties was imposed by Art. 20 of the Covenant of the League of Nations which required the member-States not to conclude treaties inconsistent with the Covenant.

It is generally the heads of the State who are really competent to make treaties on behalf of the State. The treaty-making power may be exercised by the representatives of the heads of the State. These representatives derive their authority from the heads of States and act within the scope of the powers assigned to them. The treaties concluded by these representatives require ratification by the heads of the States. Treaties in making which the representatives have either exceeded their authority or have acted contrary to the instructions are not binding on the States.

The capacity to enter into a treaty is inherent in Statehood and sovereignty. "The capacity of States to conclude international treaties is an attribute of their sovereignty, and no limitation of the exercise by an international treaty can be, regarded as being incompatible with the principle of State sovereignty. In concluding international treaties, States display their sovereignty, though, in so doing they may limit its exercise."[1] By concluding treaties the contracting parties reconcile their conflicting interests and bring into existence rights and obligations in respect of the subject matter of the treaties The Permanent Court of International Justice in the case of the Diversion of Water from the Mense (1937) dealing with the intervention of 1863 between Belgium and Netherlands observed that it was "an agreement freely concluded between two States seeking to reconcile their practical interests with a view to improving an existing relation rather than to settle a legal dispute concernig mutually contested rights."

"Normally competence is made known through the issuance of full powers, and prudent States make certain that the documentary evidence thereof is in order before proceeding with the negotiation and the conclusion of an agreement. But, as was indicated in the *Eastern Greenland* Case, certain officials, by virtue of office held, may be regarded as speaking authoritatively when they take actions that may reasonably be

1. Schwarzenberger: International Law p. 173.

presumed to imply an engagement. The President of the United States, for example, would not have to grant full powers to himself. Just who may be accorded the power to conclude a particular agreement-an ambassador, a special representative a post-master general, a treasury official-is a matter determined in each country by its national constitution and relevant municipal ligislation. As far as International Law is concerned an official acting ultra vires is just as competent to bind his State as is one accorded full powers."[1]

The Harvard Research summarises the legal position thus : "there is a large body of doctrine to the effect that the international validity of treaties is a matter which is determined by international law, that while a State may by constitutional provisions limit and regulate the exercise of treaty-making power, such provisions have no international significance, and that treaty made by organs designated by the constitution to exercise the treaty-making power are binding as international engagements even though the treaty-making organ or organs exceeded their constitutional competence. Turning now to the opposite view, we find that there is an equally large body of opinion–perhaps larger—which maintains that the international validity of treaties and the competence of the treaty-making authorities, are determined, in part at least, by the constitutional law of the States which enter into them and that International Law recognises that this law must be taken into account; that a treaty which has not been made in conformity therewith does not express the real will of the State and is not therefore binding on such State, either internally or internationally ; that the notion that a State may be bound internationally when it is not bound internally or constitutionally, is illogical and contradictory; and that it is both the right and duty of a State when negotiating with another State to verify by enquiry the facts relative to competence of the treaty making organs of the latter State. According to this view a treaty can bind a State to do only what the treaty-making authority is competent under the constitution of that State to bind it to do ; and therefore a treaty which is unconstitutional or ultra vires for want of competence on the part of the treaty-making authorities or for excess of competence, is null and void and consequently not binding on the State whose constitution has been violated. Turning from an examination of the doctrine to the practice, it may be stated that generally States have denied the binding force of treaties concluded in violation of their own constitution

1. Gould : An Introduction to International Law p. 308-309.

although they have sometimes insisted upon execution of those which had been ratified by the other parties in violation of their constitutions. It seems clear from this summary of the doctrine, the practice and the jurisprudence, that the preponderence of authority is in favour of the view : (1) the competence of the treaty-making organs of a State is determined by the law of that State ; and (2) that treaties made on its behalf by organs which are not competent under that law to conclude them are not binding internationally upon such State."

Ratification of Treaties.—It has already been stated that treaties concluded by the representatives of the States require ratification. *Oppenheim* defines ratification as "the final confirmation given by the parties to an International treaty concluded by their representatives and is commonly used to include the exchange of the documents embodying that confirmation."[1]

According to *Gould* "Ratification, whereby the Stamp of final approval by a constitutionally authorised agent is placed upon certain agreements, is a process which may reveal openly the extent to which international politics are subjected to domestic politics."[2] The Permanent Court of International Justice in the case of the jurisdiction of the International Commission of the River Oder observed that "Conventions, save in certain exceptional cases, are binding only by virtue of their ratification."

Ratification confers validity on treaties and no treaty is binding until it has been ratified. A treaty is to be ratified according to the procedure laid down in the constitution of the States which have to make the ratification. Writers differ as to the effect of ratification made by the heads of the State contrary to constitutional procedure of their States. Some writers maintain that even though a treaty has not been ratified according to the constitutional procedure it is binding while majority of writers are of opinion that a treaty ratified in contravention of the provisions of the constitution of the States is invalid.

That treaties require ratification is recognised by International Law. Even treaties which are entered into by the heads of the State require to be ratified if they are in respect of matters for which ratification is needed under the consti-

1. Oppenheim—International Law Vol. I (Seventh Ed.) p. 813.
2. Gould :—An Introduction to International Law p. 309.

tution of the State. Sometimes ratification is dispensed with by a stipulation to that effect in the treaty itself. Such a stipulation if made by a representative must be authorised under the powers granted to him.

Whether or not a treaty will be operative on signing or on ratification is to be determined by the intention of the contracting parties. There is no hard and fast rule governing the matter of operation of a treaty. If the parties intend that their treaty is to come into effect on the date of signing, there is no rule of International Law which will prevent it from coming into force on that date. The parties to a treaty are permitted to dispense with ratification. Judge *Moore* in his dissenting opinion in the case of *Mavromatis Cancessions* (1924) observed that "the doctrine that Goverments are bound to ratify whatever their plenipotentiaries acting within the limits of their instructions may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified is obsolete and lingers only as an echo from the past." International Law regards the intention of the parties as the determining factor in finding out whether a particular treaty comes into operation after it had been signed. According to *Schwarzenberger* the question whether or not a treaty is to be operative only on ratification "does not appear to depend on a hard and fast rule one way or the other, but on the overriding test which has repeatedly been applied by the Permanent Court of International Justice : the intention of the parties. Though it may be argued that treaty interpretation presupposes a validly concluded treaty, International Law leaves it to the parties to an agreement whether, and to what extent they wish to make the coming into force of a treaty, dependent on any formalities. It is therefore only with reference to the intention of the parties that, in each particular case, it can be determined whether a treaty comes into operation with its signature or on ratification."

There exists no definite form in which a ratification is to be made. Ratification may either be expressed or tacit. A treaty is tacitly ratified if the States concerned begin to act upon its terms. The Heads of the States or their Government are entitled to ratify the treaties. The powers of ratification may even be delegated to the representatives under the Municipal Laws of the States.

Treaties cannot be ratified in part or on a condition. Conditional or partial ratification has no meaning in law and

is tantamount to refusal. But ratification with reservation if accepted by the other party may be good in law. The reservation clause may seek to amend the treaty in some particular part. If the change sought to be made by such a reservation clause is accepted by the other party the treaty in its changed form becomes legally valid. Sometimes the States ratify the treaties on an understanding that particular terms of the treaty which they ratify will be interpreted in a certain way. Such ratification with the understanding if accepted by the other party gives legal effect to the treaty.

The instrument of ratification is not only to be signed and sealed but is to be exchanged between the parties or to be deposited at some agreed place. According to *Oppenheim* the effect of the exchange or deposit of ratifications by the parties is to make a treaty binding and that if one party executes an instrument and the other does not do so, the treaty falls to the ground.

There is no time limit for ratification. A treaty is to be ratified within a reasonable time. Unusual delay leads to inference that ratification has been refused.

Operation of treaties.—The rights and obligations arising under international agreements come into display from the date on which the international agreements take effect. In most cases treaties require ratification for their validity. It is in exceptional cases that no ratification is needed. Treaties which require no ratification for their validity come into effect on the date on which they are signed. The date of signatures is the point of time on which treaties requiring no ratification become binding. It is open to the contracting parties to specify the date on which a treaty is to come into effect.

Treaties which require ratification for their validity come into force on the date of ratification. Such treaties give rise to no rights and obligations unless they are ratified. The earlier writers held the view that ratification was retroactive in its effect and that the treaty came into force on the date on which it was signed. The American view formerly was to regard treaty as binding from the date when it was signed. This view did not receive general acceptance and the present rule is that ratification is not retroactive in its effect and that a treaty requiring ratification for its validity comes into operation on the date of ratification and the date of signatures is of no legal consequence. The signatures on treaties which

require ratification do not even have the effect of making signatories parties to the treaty. In its advisory opinion on Reservations to the Convention on Genocide (1951) the International Court of Justice stated that "It is evident that without ratification, signature does not make the signatory State a party to the Convention."

There is general agreement on the rule that ratification does non date back to the date of signature and that in cases where an international agreement requires ratification it is the date of ratification on which it becomes binding on the parties. The rule that ratification is retroactive in its effect does not find support from the modern writers or from the practice of States. According to *Oppenheim* "the fact that ratification imparts the binding force to a treaty seems to indicate that ratification has regularly no retroactive effect."[1]

Reservations.—The right to enter into a treaty or international agreement is inherent in Statehood. By entering into a treaty a State places limitations on its independence and sovereignty. It is therefore obvious that a State may not be willing to be fully bound by a treaty and may agree to be bound by it with certain reservations. The effect of the reservations to a treaty is that the relations between the reserving State and other signatories to the treaty are restricted and are not the same as operate between the other signatories. "A reservation constitutes an exercise of sovereignty since it has the effect of binding the reserving State no further than it chooses to be bound."[2] A reservation to a treaty imports a clear idea that the reserving State wishes to be bound by the terms of the treaty subject to some specified modifications. *Starke* defines a reservation as 'a formal declaration by a State made when signing, ratifying or according to a treaty, whereby as a condition of its willingness to become a party to the treaty, it stipulates for exemption from one or more provisions of the treaty, or the modification of these provisions, or the interpretation of the provisions in a particular way."[3] A reservation is a sort of a proviso in favour of the reserving State. It undermines the efficacy of the treaty as a whole in relation to the reserving State and enables a State, which is unwilling to shoulder all the obligations of the treaty in the manner specified therein, to accept

1. Oppenheim : International Law Vol. I. (Seventh Edition) p, 824.
2. Gould.—An Introduction to International Law p. 313.
3. J. G. Starke.—An Introduction to International Law p. 305.

the terms of the treaty subject to certain conditions prescribed by it. It is a privilege of Statehood to sign, ratify or adhere to a treaty in a manner acceptable to it, and International Law and practice permits a State to agree to be bound by a treaty with certain reservations. A reservation operates to vary the terms of a treaty for the benefit of the reserving State.

A treaty may provide for exclusion of any reservation and in such a case no State will be permitted to make reservations. When reservation is not excluded by a clause in the treaty, it may be made by a State at the time of signing, ratifying or adhering to, the treaty. A reservation may be made by a statement written on any part of the original treaty with the signatures of the reserving State or may be expressed in a formal separate document as a part to the treaty. A treaty may contain a reservation clause and may enable a State to become a party to the treaty under the reservation clause. If the treaty has no reservation clause and also has no provision excluding reservation a State may make a reservation in a proper manner.

A reservation to a treaty is valid in law under certain conditions. A treaty providing for a reservation clause may be signed, ratified or adhered to by any State with reservations and the signatories to the treaty are bound by the reservations made. In the case of treaties which neither contain a reservation clause nor exclude reservation, a State may make a valid reservation only when the other parties to the treaty consent to such reservations. The absence of consent of the parties to a treaty other than the reserving State vitiates the reservation altogether. The non-acceptance of a reservation by a party to a bilateral treaty renders the treaty ineffectual. In a multilateral treaty the question of consent assumes great importance, for such treaties bring about multilateral engagements where each party undertakes obligations in relation to all other parties. Reservations to such multilateral treaties are valid only when other parties to the treaty have expressed their consent to them. Another question of some difficulty that arises with regard to the reservations is whether the approval of all the parties to the treaty is necessary. The League of Nations started the practice of being guided in this matter by the opinion of the Committee of Experts for the Progressive Codification of International Law. The opinion of this Committee on the question whether the reservation to a treaty required the approval of all the parties or of only some of them was decisive of the matter. The Secretary General of the General

Assembly of the United Nations declared in the fifth session of the General Assembly that he was following the practice of the League. The rule laid down by him is stated thus :

"A State may make a reservation when signing, ratifying or acceding to a convention prior to its entry into force, only with the consent of all States which have ratified or acceded thereto upto the date of entry into force ; and may do so after the date of entry only with the consent of all States which have theretofore ratified or acceded."

An important case on reservations is the Advisory Opinion on Reservations to the Cnnvention on Genocide of the International Court of Justice (1951,. The Court held that :—

(*a*) in case a reservation made by a State is objected to by any party to the Convention or Conventions the reserving State would be regarded a party to the Convention only if the reservation is compatible with the object and purpose of the Convention.

(*b*) a party to the Convention has a right to judge for itself whether a reservation made by any other State is compatible with the object and purpose of the Convention.

(*c*) a State which has not yet signed, ratified, or adhered to the Convention has no right to object to the reservation made by another State.

Discussing the opinion of the Court *Lauterpacht* observes thus :

"In the Opinion on the Reservations to the Genocide Convention the traditional rule of unanimous consent, to any particular reservation, of the parties to the Convention lent itself to a similar, though more drastic, modification—by reference, possibly, to the same, though more reasonably interpreted, principle of sovereignty which gave birth to the original rule of unanimous consent. Admittedly, the sovereignty of the contracting parties requires that they should not be compelled to enter into a treaty relations with a State attaching a reservation varying the terms of the Treaty as agreed. But there is also no force in the view which seems to underlie the opinion of the Court, that the sovereignty of the contracting parties demands that they should not be deprived of the participation of a State making a reservation—however reasonable—by a refusal however unreasonable

and however unrepresentative, of other States to consent to such reservation."[1]

Invalid Treaties.—International Law recognises circumstances which may render treaties wholly invalid. It is necessary to discuss circumstances which are often put forward as vitiating international agreements.

1. Force or Duress.–A treaty gets it binding force from the consent of the parties. A consent obtained by intimidation or coercion is no consent in law. Obviously a treaty which is concluded under duress or coercion should be invalid. A treaty imposed upon by the victor as a result of war has been regarded to be valid and has not been considered to be vitiated as having been made either under duress or coercion. History gives us many instances where rulers defeated in war were made to sign treaties dictated by the victors. *Grotius* maintained that such treaties were valid. *Hall* took the view that force and intimidation which were legitimate means of getting redress for the wrong could not vitiate the agreement.[2] *Brierly* suggests an explanation for such a law: "Historically the explanation of this state of the Law is easily understood; it is that so long as international law was not strong enough to forbid the settlement of disputes by force, it would have been idle for it to refuse to recognise an agreement induced by force." A peace treaty is different from other international agreements, for the former is brought about as a result of war between the vanquished and the victor while the latter come into existence as a result of negotiations between States on the basis of equality. Peace treaties are not negotiated but are imposed on the vanquished by the victor and the question of consent hardly arises, for the vanquished has no option but to make peace at the will of the victor. It is therefore manifest that peace treaties cannot be invalidated on the ground of force or duress. According to *Brierly* a peace treaty, though it is ou'wardly a contract, really belongs to a different category. He holds the view that the essence of a peace treaty is that the victor imposing it claims a right to legislate or to lay down law by which the vanquished may, hereafter, be governed. He points out that the fallacy in the argument against the validity of peace treaties lies in regarding such treaties as contracts.

International agreements which are not peace treaties stand on a different footing. The question is whether force or duress

1. Lauterpacht:—The Development of International Law through the International Court p. 374.

2. Hall: International Law p. 108.

will constitute a ground for invalidating international agreements which are not peace treaties. The traditional view was to regard use of force or direct threat using force as factors vitiating international agreements. In accordance with this view the treaty whereby in 1807 Ferdinand VII agreed to renounce the throne was declared invalid as having been brought about by threat held out by Napolean. Duress, according to the traditional view consisted in use of force or threat of using force against the individual signing the treaty. The Treaty of March 1939 between Czechoslovakia and Germany whereby German protectorate was established over Bohemia is regarded by some writers including *Schwarzenberger* as having been brought about under duress employed against the negotiators. The plea of the invalidity of an international agreement on the ground of duress is sometimes improperly taken by States. Such a plea was advanced by Pakistan when it denounced the Inter-Dominion Agreement of May 4, 1948 with regard to the water flowing into Pakistan from Sutlej and Ravi rivers. The most recent case in which duress has been pleaded for denouncing an international agreement is that of Tibet. The Dalai Lama in his statement on June 20, 1959 about the Seventeen Point Agreement of May 23, 1951 declared at Mussoorie :

"The agreement which followed the invasion of Tibet was also thrust upon its people and Government by threat of arms. It was never accepted by them of their own free will. Consent of the Government was secured under duress and at the point of bayonet. My representatives were compelled to sign the agreement under the threat of further military operations against Tibet by invading armies of China leading to the utter ravage and ruin of the country...while I and my Government did not voluntarily accept that aggreement we were obliged to acquiesce in it and decided to abide by its terms and conditions in order to save my people and country from the damages of total destruction."

There is no reason why an international agreement may not be avoided on the ground of use of force and employment of duress. An international agreement sets legal efficacy by the consent of the parties. Consent obtained by force or under duress is no consent in the eye of law and a party to an international agreement can justly plead that he was made to consent by use of force or by employment of duress. The traditional view that the use of force or employment

of duress vitiates an international agreement still holds good. A contrary view would be inconsistent with the purpose of International Law of subordinating force and cannot be accepted at the present time during the regime of the United Nations. *Oppenheim* observes thus :

"The position has now verbally changed in so far as war has been prohibited by the Charter of the United Nations and the General Treaty for the Renunciation of War. The State which has resorted to war in violation of its obligations under these instruments cannot he held to apply force in a manner permitted by law. Accordingly duress in such cases must, it is submitted, be regarded as vitiating the treaty."

To the same effect is the view of *Kelsen* who states that "since, however, under the Charter of the United Nations threat or use of force in international relations is illegal, the organs of the United Nations may consider a treaty imposed by force as null or annulable."[1]

Whether use of force or employment of duress as vitiating an international agreement should be against the negotiator or against the State is a question on which writers are not agreed. The general view is that use of force or employment of duress against the negotiator furnish a good ground for avoiding an international agreement. "Writers have regularly agreed that the employment of duress against the negotiator of an international agreement renders the agreement voidable. The establishment of the German protectorate over Bohemia by the German Czech Treaty of March, 1939 has been regarded by some writers, as an example of duress against the negotiator, while others have regarded it as a case of duress against the State itself."[2] The use of force against a State has generally not been regarded as invalidating an international agreement. The Soviet view that Soviet force used against a State cannot vitiate a treaty is rather curious and reflects the special ideology permeating the Soviet system. The result of this discussion is that while use of force and employment of duress against the negotiator of the international agreement vitiates the agreement, the use of force against the State cannot be regarded as invalidating the agreement.

2. Error.—A treaty made under some error or delusion produced by fraud of the other contracting party can have no

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1. Hans Kelsen : International Law p. 326.
2. Gould : An Introduction to International Law p. 321.

legal effect. *Gould* observes that "a treaty entered into in consequence of substantial and excusable error concerning the facts would be voidable at the option of a party to the agreement."[1] Great Britain pleaded error in the Mavrommatis Jerusalem Concessions Case on the ground that Mavrommatis was described as an Ottoman subject but the plea was not accepted.

3. **Fraud.**—A treaty concluded as a result of fraud or misrepresentation is invalid.[2] Writers on Public International Law are generally agreed that fraud vitiates international agreements.

4. **Illegality.**—Treaties which have been concluded in violation of the principles of International Law or in derogation of the principles of the Charter of the United Nations can have no effect. Art. 103 of the Charter lays down that in case of conflict between the obligations of the members of the United Nations and obligations imposed upon them by the treaties their obligations under the Charter shall prevail ; "it is unanimously recognised customary rule of International Law that obligations which are at variance with the universally recognised principles of International Law cannot be the object of a treaty."[3]

5. **Impossibility.**—Treaties providing for obligations the performance of which is a physical impossibility cannot be binding.[4]

6. **Immorality.**—A treaty for an immoral object cannot be recognised. It cannot be denied that in the past many treaties stipulating immoral obligations have been concluded and executed but this does not alter the fact that such treaties were legally not binding upon the contracting parties".[4]

Morality in international relations plays an important part and anything against it in a treaty cannot be countenanced by nations. International opinion will look with disfavour at treaties entered into for objects against morality. "Treaties having as their objects something contrary to morality have frequently been declared by publicists to be illegal. In such a category might be included an agreement to expand opium trade by circumventing the narcotics laws of other countries. An

1. Gould—An Introduction to International Law p. 326
2. Fenwick—International Law (Third Edition) p. 442.
3. Oppenheim—International Law Vol. I (Seventh Edition) p. 808.
4. Oppenheim— International Law Vol. I (Seventh Edition) p. 807.

aggressive alliance would fall in this category as being not only immoral but also in contravention of a general norm of International law upholding the independence of existing States, including the potential victim of aggression".[1]

Registration and publication of treaties.—The last step in the making of a treaty capable of binding the parties is that of registration and publication. Registration and publication were made compulsory by Covenant of the League of Nations which provided :—

"Every treaty or International engagement entered into hereafter by any member of the League shall be forthwith registered with the Secretariat and shall, as soon as possible, be published by it. No such treaty on International engagement shall be binding until so registered." The Charter of the United Nations also requires under Art. 102 that every treaty and every International agreement entered into by any member of the United Nations after the present Charter comes into force shall, as soon as, possible be registered with the Secretariat and published by it. The Charter further provides that an unregistered treaty or International agreement shall not be invoked by any party to it before any organ of the United Nations.

Effect of treaties on third parties.—It is a recognised principle of law that treaties bind the contracting parties and have ordinarily no legal effect on third States. The Permanent Court of International Justice held "A treaty only creates law as between the States which are parties to it ; in case of doubt, no rights can be deduced from it in favour of third States."[2] But contracting parties to a treaty can expressly confer a right or a privilege on third States without imposing a corresponding duty on them. Such treaties as confer rights and privileges on third parties have been recognised by International Law. The Permanent Court of International Justice observed thus :—

"It cannot be lightly presumed that stipulations favourable to a third estate have been adopted with the object of creating an actual right in its favour. There is, however, nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired

1. Gould : An Introduction to International Law p. 325.
2. Case concerning certain German Interests in Polish Upper Silesia P. C. I. J. Series A. No. 7.

under an instrument drawn between other States is, therefore, one to be decided, in each particular case ; it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such".[1]

Treaties conferring rights on third parties are not uncommon. According to *Kelsen* such treaties are :—

1. Treaties with respect to servitudes whereby rights for the successor to the dominant State are created.

2. Treaties providing for protection of minorities whereunder third States have been given the right to complain against violation of terms of the treaty, such treaties were concluded by Principal-Allied Associated Powers with Poland signed on June 28, 1919 ; with Czechoslovakia, signed on September 10, 1919.

3. Treaties concerning a canal or a strait stipulating that the canal of the strait shall be open to vessels of all nations *e. g.* the Hay—Pauncefote Treaty between Great Britain and the United States of 1901.

4. The Peace treaty of Versailles containing provisions for the benefit of Russia, Denmark and Switzerland which were not contracting parties.

5. The Peace Treaty with Italy of 1947 containing provisions in favour of any member of the United Nations which broke off diplomatic relations with Italy and which took action in cooperation with the Allied and Associated Powers.

6. Treaties imposing duties and responsibilities upon private individuals and treaties conferring rights on private individuals *e. g.*, the Peace Treaty of Versailles whereby the nationals of the Allied-Associated Powers were authorised to bring action against Germans before Mixed Arbitrate Tribunals for damages.

It is thus clear that treaties of the nature described here concern third parties and that there is nothing illegal about a treaty by which parties really intend to confer a right or a privilege on a third State. Whether or not the contracting parties to a treaty meant to create an actual right is to be ascertained from the circumstances of each case. The question,

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1. Case of the Free Zones of Upper Savoy and the District of Gex P. C. I. J, Series A/B No. 46 p. 170.

however, arises whether the contracting parties are precluded from modifying or abrogate the right conferred on and accepted by, a third State. *Oppenheim* is of the view that there is nothing to prevent the contracting parties from altering such a treaty, without the consent of third States provided the latter have not in the meantime customarily acquired such rights through the unanimous implied consent of all concerned.[1]

The Permanent Court of International Justice in the case of German Interests in Polish Upper Silesia (1926) laid down the principle that a treaty may employ a clear language to confer rights on third States and that 'in case of doubt, no rights can be deduced from it in favour of third States'. This principle was reaffirmed by the Court in the case of the Chorzow Factory (1928). In the case of the Free Zones of Upper Savoy and the District of Gex (1932) the Court held: "Article 435 of the Treaty of Versailles is not binding on Switzerland which is not a party to this Treaty, except to the extent to which that country has itself accepted it". In the Palmas Case the Permanent Court of Arbitration observed that treaties cannot have the effect of "disposing of the rights of independent third Powers."

But treaties which have the effect of injuring third States cannot be sustained. No two or more States by their agreement impose obligations on other States. "Where legal rights of third States are jeopardized, the law of treaties normally sustains rights existing before consummation of an alienating agreement. If an existent right is traceable to a prior treaty between the third State and one of the parties to the treaty derogating from that right, the earlier treaty prevails. The latter treaty in so far as it affects third States adversely, is illegal."[2]

Accession and adhesion.—There are two methods which enable a third State to become a party to an already existing treaty. The terms, accession and adhesion, imply formal entrance of a third State into an existing treaty. Some writers are of the view that by accession a third State becomes a party to all the terms of treaty to which it acceded and by adhesion the third state does not become a party to the whole treaty but only to such stipulations in the treaty or to such principles laid down in the treaty as have been adhered to by the third State. These writers maintain that accession denotes full while

1. Oppenheim :—International Law Vol. I (Seventh Ed.) p. 832-833.
2. Gould : An Introduction to International Law p. 325-326.

adhesion denotes partial participation in the treaty. *Oppenheim* points out that the aforesaid distinction between adhesion and accession is merely theoretical and is not supported by the practice of States.

Accession and adhesion require the consent of the contracting parties to the existing treaty. Third States cannot without the consent of the contracting parties either accede to or adhere to a treaty already in existence. Usually third States enter into an existing treaty by virtue of an adhesion or accession clause incorporated in the treaty itself. Such clauses usually find place in treaties in which the contracting parties intend to confer privileges on third States and are meant to make possible for third States to become parties to the treaty.

Termination of Treaties.—International Law recognises the following ways in which a treaty may lose to have any legal effect :—

(*a*) **By expiration.**—A treaty may become extinct on expiry of the time for which it was concluded. Also a treaty which provides that it will expire upon the occurrence of certain circumstances ceases to have any force when these circumstances occur.

(*b*) **By dissolution by mutual consent.** –The parties to a treaty which is executory in its nature may always be dissolved by mutual consent. This dissolution may take place on an express declaration to the effect that the treaty is dissolved. The parties to the treaty may conclude a new treaty between themselves for the same objects as those of the earlier treaty without reference to the earlier treaty. Another way of dissolving the treaty is by renunciation. A party to a treaty may renounce his rights under the treaty with the consent of the other party liable to certain duties under the treaty.

(*c*) **By dissolution on withdrawal of notice.**—International Law recognises the right of a party to dissolve a treaty after giving notice of withdrawal to the other contracting party. It is, however, to be noted that all treaties are not subject to this rule and cannot be dissolved by a notice of withdrawal. Only those treaties which contain either certain clause authorising a party to withdraw after giving notice or which are merely temporary in their nature and are not intended to aim at some

permanent arrangement, can be dissolved by withdrawal after giving notice to the other party. Of this nature are treaties of commerce or alliance.

(*d*) **By dissolution on vital change of circumstances.**—A party to a treaty may feel justified in demanding to be released from treaty obligations on the ground of essential change of circumstances under which the treaty was concluded. It is only in rare cases that a treaty may be dissolved owing to a vital change of circumstances.

In the cases where the treaty obligations cannot be under the changed circumstances discharged by third State without imperilling its very existence, the State is entitled to demand its release from the treaty.

Oppenheim observes thus.—"Be that as it may, it is generally agreed that the clause *rebus sic stantibus* may only be resorted to in very exceptional circumstances, and that certainly not every change of circumstances justifies a State in making use of it."[1]

How far the principle of changed circumstances has been recognised in International Law will be discussed separately.

(*e*) **By becoming void.**—A treaty though valid in its inception may subsequently become void in the following circumstances:—[2]

1. When one of the contracting party to a treaty becomes extinct and the treaty obligations under the law of International succession do not devolve upon the State succeeding to the extinct contracting party the treaty ceases to have any legal effect. On the ground of extinction of a party the treaties of alliances, neutrality and the like become void

2. When the performance of the obligations under the treaty subsequently becomes impossible, the treaty becomes void. If the impossibility of performance is only temporary the treaty remains suspended.

3. When the object of the treaty is realised otherwise than by fulfilment the treaty becomes void.

4. Treaties, the obligations of which concern a certain object become void through the extinction of the object e. g.

1. Oppenheim—International Law Vol. I (Seventh Edition) p. 847.
2. Oppenheim—International Law Vol. I (Seventh Edition) p.851.

a treaty concluded in regard to an island becomes void when the island disappears.

(f) **By cancellation**—A treaty may be cancelled in the following circumstances:—

1. International Law is progressive and a rule laid down by it now may not hold good fifty years hence. Now a treaty which was in accordance with the rule of International Law at the time it was made, may after sometime become inconsistent with International Law, such subsequent inconsistency is a ground for cancelling the treaty.

2. When one party to a treaty violates the treaty, the other party may exercise its discretion to control it. This discretion is to be exercised within a reasonable time. If the discretion is not exercised in due time the right must be taken to have been waived.

3. The change of the Status of one of the contracting parties may, *ipso facto* cancel the treaty. When a State which was party to a treaty becomes a dependency to another State and loses its sovereignty there is an end of the treaty The cancellation of a treaty on this ground will depend on the particular facts of the change of status.

4. A treaty may be cancelled as a result of a war. It is proposed to discuss separately the effect of war on treaties.

Interpretation of Treaties.—The purpose of interpretation of a treaty is to get at the real intention of the parties making the treaty. Intention of the parties to the treaty must be gathered from terms of the treaty itself and if the terms are clear and specific no proof of an intention contrary to them is admissible. Disputes as to the interpretation of treaties existing between the States are very common and although there are no rules of interpretation in International Law jurists begining with *Grotius* have developed a body of rules for the guidance of the States in the matter of interpretation of their treaties. Treaties which contain their own rules of interpretation present no difficulty for they are to be interpreted in the way adopted by the parties in the treaty itself. But treaties which contain no such interpretation clause are to be interpreted according to the well recognised rules of the interpretation. Important rules of interpretation may briefly be stated thus:—

1 When treaty is not clear the record of all the steps that were taken till the final conclusion of the treaty may be looked into for the purpose of interepreting the treaty.

2. In case of ambiguity the intention of the parties is to be gathered from the whole treaty and in considering the whole treaty it is permissible to look atthe surrounding circumstances e.g. the purpose of the treaty and motive leading to the conclusion of the treaty in order to discover the intention of the parties.

3. The words in a treaty are to be understood in their popular sense unless they are used in a technical sense.

4. If the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty the consistent meaning to the meaning inconsistent with generally recognised principles of International Law and with previous treaty obligation towards third States.[1]

5. If two interpretations are possible the one that involves the minimum of obligation to the parties should be adopted.

6. In interpreting a treaty previous treaties between the party or parties with third States should be taken into consideration.

7. If two meanings of a stipulation are admissible that which is best to the advantage of the party for which benefit the stipulation was inserted in the treaty should be preferred.[2]

8. No stipulation of a treaty is to be considered meaningless and interpretation which renders a stipulation meaningless should be avoided.

9. A treaty should be interpreted in such a way as may advance the purpose for which it was made.

10. A treaty should be interpreted so as to exclude fraud and so as to make its operation consistent with good faith[3].

11. In interpreting the treaties the political and economic circumstances under which the treaty was established may be taken into consideration.

1. Oppenheim—International Law Vol. I (Seventh Ed.) p. 859.
2. Oppenheim—International Law Vol. I (Seventh Ed.) p. 860.
3. Oppenheim—International Law Vol. I (Seventh Ed.) p. 861.

Doctrines.—Pacta Sunt Servanda and Clausula Rebus Sic Stantibus.

These two doctrines of the Roman Law have exercised a great influence on juristic theory relating to the binding nature of international treaties.

Pacta Sunt Servanda originally applied to private contracts has become a recognised rule of customary International Law. This principle which means that parties are bound by what they have mutually agreed established the sanctity of treaty obligations. It is a rule of good faith which is essential in all contractual relations. The principle *Pacta Sunt Servanda* which embodies a rule of natural justice requires that States after having consented to the terms of a treaty are legally bound to discharge their treaty obligations. It is the good faith of contracting parties which provides the binding force of a treaty. It is again good faith which is the basis of international relations. "Philsophers, theologians and jurists have recognised with unanimity that unless pledged word of a State could be relied upon the relations of the entire international community would be imperilled and law itself would disappear.[1]

The other rule *Clausula Rebus Sic Stantibus* of the Roman Law in its application to treaty relations has been widely criticized. According to the Roman Law every contract was subject to an implied condition *rebus sic stantibus* (things remaining as they are). The effect of this implied condition was that a contract was binding provided the circumstances in which it was entered remained the same. The rule that a contract lost its legal effect with the changes of circumstances was the corollary deduced from the aforesaid doctrine.

It is no doubt true that Municipal Laws of many States allow individuals to cancel private contracts on the ground of change of circumstances. Many writers supported the view that a treaty like a contract lost its binding force on change of circumstances and enunciated a rule that a party to a treaty was entitled to repudiate its treaty obligations on the ground that change took place in the circumstances under which the treaty was concluded. Some jurists held the view that only essential or vital change in the circumstances was enough to entitle a party to repudiate the treaty. Their argument was that if a change of circumstances was so essential or vital that compliance with the treaty was likely to

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1 Fenwick—International Law (Third Ed.) p. 430.

imperil its very existence, the State could not be held bound by the treaty inasmuch as its fundamental right of existence was more precious than its obligations under the treaty. They, therefore, agreed that every treaty carried with it an implied condition *rebus sic stantibus.*

The position that emerged was that on the one hand the rule *pacta sunt servanda* which had become a rule of customary International Law insisted upon the binding nature of the treaty and on the other hand, the doctrine *clausula robus sic stantibus* allowed repudiation of a treaty on vital changes occurring in the circumstances. "Taken together, the principles *pacta sunt servanda* and *rebus sic stantibus* represent in International Law what has been referred to earlier as the purpose of law, namely, to protect the Status quo of today in its process of change into the Status quo of tomorrow... ..If unilateral invocation of the *clausula rebus sic stantibus* is to be avoided as leading tothe promiscuous denunciation of treaty obligations then it is also desirable to avoid unilateral invocation of *pacta sunt servanda* in order to perpetuate injustice or to further questionable political or economic policies. Political uses of *pacta sant servanda* may profane rather than sanctify treaties. Law can perhaps reign nominally but it cannot rule if its maxims are employed for the subversion of its major purpose."[1]

The two doctrines were sought to be reconciled by an argument that although a State was bound by the treaty, it could not be allowed to sacrifice its very existence at the altar of *pacta sunt servanda.* The German writers of the nineteenth century amplified the scope of the doctrine *clausula rebus sic stantibus,* by laying down the rule that a State was not bound by treaty which was either in conflict with rights and welfare of its people or incompatible with the development of the State. Other writers took the same view and the rule of *clausula rebus stantibus* held the field. In 1870 Russia took advantage of this rule by declaring that it was not bound by a part of the treaty of Paris of 1856 on the ground of material change in the circumstances. Great Britain persisted and a conference was held in London in 1871 This conference while allowed Russia to release itself from the treaty of 1856 made a declaration to the effect that "it is an essential principle of the law of the nations that no power can liberate itself from the engagements of treaty, nor modify the stipulation thereof, unless with the consent of the contracting powers, by means of an amicable

1. Gould : An Introduction to International Law p. 341-342.

arrangement." This declaration evoked a lot of controversy. Commenting upon this Declaration *Hall* writes:—

"This general correctness of the principle is indisputable and in a declaration of the kind made, it would have been impossible to announce it with these qualifications which have been seen to be necessary in practice."[1] *Lawrence* observes that the declaration "sounds well" ; but a little consideration will show that it is an untenable as the lax view that would allow any party to treaty to violate it on the slightest pretext."[2] *Kelsen* regards it as an open rejection of the *clausula rebus sic stantibus.*[3]

Whatever be its real import this declaration strengthened the view that the application of the rule *rebus sic stantibus* should not entitle a state to declare itself free from its treaty obligations immediately on the happening of vital change in the circumstances and that the State concerned should arrange for an abrogation of the treaty with the consent of the other party. The Council of the League reiterated this declaration when in 1935 Germany unilaterally repudiated some of her obligations under the Treaty of Varsailles.

Inspite of all this the rule of *rubes sic stantibus* appears to have received very little consideration from international and other tribunals. Although the principle underlying this rule has not been rejected, the rule itself has not been applied by the international tribunals to the cases before them. In the case of the Free Zones of Upper Savoy and the District of Gex the Permanent Court of International Justice held that the circumstances pointed out by France as a ground for repudiation of its treaty obligations could not be taken into account.

It would thus appear that the rule *rebus sic stantibus* cannot be said to be an established rule of international law. *Starke* observes: "The *rebus sic stantibus* doctrine is one of the enigmas of the International Law. Its exact scope and application are uncertain, practice is inconsistent and international tribunals fight shy of committing themselves to pronouncements or decisions involving it".[4]

1. Hall—International Law p. 116.
2. Lawrence Principles of International Law p. 134.
3. Hans Kelsen—Principles of International Law p. 360.
4. J. G. Starke—An Introduction to Interational Law (second edition p. 267.

In rejecting it, *Kelsen* regards the *clausula rebus sic stantibus* as being in opposition to one of the most important purposes of the International legal order, its purposes of stabilizing international relations.[1]

Prof. Brierly observes about the rule thus:—

"There seems to be no recorded case in which the application of the *clausula* has been admitted by both parties to a controversy or in which it has received judicial recognition from an international tribunal".[2]

Dr. Mcnair is also doubtful about the applicability of the rule when he says that "while tribunals do not usually deny it a place in International Law, in no case that I am aware of has there been a clear application of the principle in a case of internationa l litigation."

Notwithstanding the fact that the rule is uncertain in scope and application it cannot be doubted that in providing a ground for a release from treaty obligations it can be justly applied to cases where it would be greatly unjust to insist on the compliance of the terms of a treaty in changed circumstances. *Oppenheim* is in favour of the rule but restricts its application to cases of exceptional hardships and observes thus :

"The consent of a State to a treaty presupposes a conviction that it is not fraught with danger to its existence and vital development. For this reason every treaty implies a condition that, if by an unforeseen change of circumstances an obligation stipulated in the treaty should imperil the existence or vital development of one of the parties, it should have right to demand to be released from the obligation concerned." After the First World War jurists tried to reconcile the two conflicting principles, *pacta sunt servanda* and *rebus sic stantibus* because it was not possible to discard either of the two rules. The Covenant of the League provided for a reconsideration of the treaties which had become inapplicable. According to Fenwick this provision failed to achieve the object as "the fear that reconsideration of treaties might weaken the whole structure of International Law proved to be a strong deterrent to proposals of revision. Many jurists have suggested peaceful means for the revision of the treaties but no unanimity has been reached

1. Hans Kelsen.—Principles of International Law p. 359.
2. J. L. Brierly—The Law of Nations p. 244.

so far. These two competing theories have, therefore, come to stay and the States are to strive to make a rule to reconcile them. *Prof. Brierly* observed : "Every system of law has to steer a course between the two dangers of impairing the obligations of good faith by interfering which contractual engagements and of enforcing oppressive or obsolete contracts." The best reconciliation can be achieved through some legislative organ and in the absence of such an organ we must while looking to the United Nations with hope say with *Fenwick* : "Pending the establishment of such a body, International Law must continue to witness the struggle of two conflicting principles. On the one hand the necessity of stability in international relations and on the other hand the demand for such change in the legal situation created by past treaties as will meet the requirement of present justice."[1]

The two theories are not irreconcilable and an attempt to reconcile them will result in sanctifying the treaty obligations and in the ultimate analysis in upholding the rule of law in international sphere. It will be desirable to press the doctrine of *rebus sic stantibus* into service to nullify a treaty on the ground of the changed circumstances only when it clearly appears that the original circumstances formed the basis of the treaty and when the performance of the obligations under the treaty in the changed circumstance would result in manifest injustice. The unilateral invocation of the *Clausula rebus sic Stantibus* is fraught with danger and it will be good for nations to utilize this doctrine as a peaceful means to achieve the revision of the treaty in the light of changed circumstances. The doctrine does not furnish a ground for unilateral denunciation of the treaty and does not establish the supposed supremacy of the State over the obligations under the treaty. It may also be noted that the doctrine of *Pacta Sunt Servanda* cannot be utilized to perpetuate injustice and thereby to profane rather than sanctify a treaty. The States are to strive collectively on peaceful negotaitions to keep the two doctrines within their proper limits. The doctrine of *rebus sic stantibus* is to be applied either for the purpose of peaceful revision of the treaties or for termination of the treaties in a peaceful manner. The aim of peaceful revision of the treaties on the ground of changed circumstances can be achieved with the help of the United Nations or other international agency.

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1. **Fenwick—International Law (Third Edition) p. 438.**

CHAPTER XXIX

THE LEAGUE OF NATIONS

Origin.—The world shattering cataclysm of 1914-18 which brought disaster to all the nations resulted in a demand from all quarters for an institution strong enough to ensure peace and security in a war-tired world. Popular interest in the establishment of a world-organization had manifested itself soon after the outbreak of war. A group of publicmen under the leadership of Viscount Bryne framed a scheme for the formation of a league for the purpose of avoiding future wars. This scheme was published and a Society styled as 'The League of Nations Society' came into existence in 1915. The aim of this society was to establish a League of Nations, to provide arbitration or conciliation for all international disputes and to codify International Law. In 1918 another Society with similar objects was brought into existence in the style of 'The League of Free Nations Association' by another group of publicmen. The two Societies amalgamated into one known as 'The League of Nations, Union.' A similar project was conceived by a group of prominent public leaders of the United States who established a 'League to enforce Peace.' A conference under the auspices of this league met at Philadelphia in June 1915 and chalked out a four-point programme. This programme demanded the submission of all justiciable international disputes to arbitration and the submission of all other disputes to a council of conciliation, the application of economic and military force by all States against any State going to war without first submitting its disputes to arbitration or concilation and the codification of International Law. In 1916 another conference met at Washington to devise ways and means to give a practical shape to the programme. In January 1917 President Wilson addressed the American Senate on a 'World League for Peace.' As the war with all its atrocities professed the need for finding out means for peace was felt all over the world. In January 1918 Widrow Wilson announced his historic fourteen point programme stressing upon the establishment of an association of Nations 'for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small States alike.'

In March 1918 a committee of British foreign office with Lord Phillimore as its head prepared a draft convention for the creation of a league. Sometime later another draft convention of similar kind was prepared by President Wilsson.

In the meantime General, Smuts prepared his own draft. Then came the end of war in November 1918 and the Peace Conference met in January 1919. President Wilson prepared another draft and on behalf of Great Britain Sir Robert Cecil put in his own draft. The British delegation to the peace prepared an official draft out of the drafts prepared by Smuts and Cecil. Since the draft prepared by the President Wilson differed from British official draft on a number of points, the task of reconciling these two drafts and preparing a draft which may be acceptable to the two countries was entrusted to Cecil Hursts and David Hunter Miller. A composite Hurst-Miller draft formed the basis of discussion at the peace conference.

A League of Nations Commission with President Wilson as its chairman was formed. This commission brought out a draft of the Covenant for the approval of the Conference. After a few changes this draft was accepted unanimously at a primary session of the conference on April 28, 1919. The Covenant of the League was incorporated in the treaty of Versailles. On January 10, 1920 the League of Nations came into existence and the whole world heaved a sigh of relief.

Object and Functions of the League.—The Covenant of the League of Nations announced that the League had for its object the provision of International Cooperation and achievement of international peace and security. This object the High Contracting Parties were to achieve (i) by the acceptance of obligations not to resort to war, (ii) by the prescription of open, just and honourable relations between nations (iii) by the firm establishment of the understandings of International Law as the actual rule of conduct among governments, and (iv) by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another. It would appear from the language of the covenant that the League of Nations was established simply for the maintenance of peace by methods conductive to general international welfare.

The main functions of the League were the maintenance of international peace and security, the promotion of international cooperation, to bring about peaceful settlement of international disputes and to reduce armaments to the lowest point consistent with national safety.

Membership of the League—The League consisted of original members and of those which were non-original. The

original members were those who were named in the Annex to the Covenant either as signatories to the Treaty of Peace or as those who were to accede to the Covenant without reservation. Non-original members were those which were not named in the Annex but which were to be admitted later on. The admission of non-original members was by a vote of two-thirds of the Assembly. It was also provided that only those members were to be admitted as gave effective guarantees of their sincere intention to observe their international obligations and were prepared to accept regulations prescribed by the League in regard to the military, naval, airforces and armaments.

Termination of Membership.—The Covenant provided for three ways in which termination of membership takes place. Firstly, a member of the League was at liberty to withdraw from the League after giving two year's notice of its intention to do so and after fulfilling all its international obligations and all its obligations under the Covenant. Secondly, a member guilty of violating the Covenant was liable to be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other members of the League represented thereon Thirdly, a member signifying its dissent to an amendment of the Covenant was liable to cease to be a member of the League.

Structure of the League.—The main organs of the League were an Assembly, a Council, and a permanent Secretariat. The Covenant directed that the League was to perform its functions through the instrumentality of these organs. The Assembly was the representative and deliberative organ. The Council was the executive organ with the settlement of international disputes as its chief function. The Secretariat which was to assist the Assembly and the Council was the administrative organ.

There were two other organs, viz. Permanent Court of International Justice and the International Law of Organization.

The Council was to be advised on military, naval and air questions by a Permanent Military, Naval Air Commissson. Both the Council and the Assembly were allowed to be advised by technical organizations and committees.

Assembly

Its Constitution.—The Assembly consisted of the representatives of all the members of the League. Every member had the right to send not more than three representatives

to the Assembly. The Assembly was to meet at stated intervals and from time to time as occasion arose to transact the business. The Assembly was to meet at the seat of the League or at such place as might be decided upon.

The representatives of each Member-State had the right to cast votes collectively. The Assembly elected its own presiding officer and made its own rules of procedure in consonance with the provisions of the Covenant Its agenda was prepared by the Secretary-General but it was liable to be modified by the Assembly itself. The Assembly had its own committees which assisted it in its deliberations. There were six such Standing Committees—on constitutional and legal questions, on technical knowledge, on reduction of armament, on financial matters, on social and humanitarian questions, and on political questions. Besides these Standing Committees the Assembly had the right to appoint committees for a special purpose.

Its Functions.—Article 3 of Covenant required the Assembly to deal matters within the sphere of the League or affecting the peace of the world.

There were some matters within the exclusive competence of the Assembly while there were other matters in which the Assembly acted in co-operation with the Council. The main functions of the Assembly were of three kinds:—

(*a*) **Electoral Functions.**—The Assembly was to admit new members to the League by a majority of two-thirds of its members. It had to elect annually three of the nine non-permanent members of the Council. It had to make approval of the Council's appointment of the Secretary-General. It had to elect after every nine years the fifteen judges of the Permanent Court of International Justice.

The co-operation of the Assembly and Council was required in the nomination of additional permanent members of the Council and in the increase of the members of the Council.

(*b*) **Constitution function.**—The Assembly was to accept the amendments to the Covenant by a majority of its members under the provisions of Article 26. The amendments were also to be ratified by the Council.

(*c*) **Deliberative functions.**—The Assembly had to make deliberations on international, political, and economic matters likely to endanger world peace. It had to advise from time

to time the reconsideration by members of the League of treaties which had become inapplicable. It had to supervise the work of the Council and to revise the budget of the League which was to be prepared by the Secretariat. The Assembly made an apportionment of the expenses of the League among the members.

The League Council

Its Constitution.—The Council was a smaller body. It was intended to consist of five permanent members, viz., the United States, Great Britain, France, Italy and Japan and also four non-permanent members. In 1920 the non permanent members were Belgium, Brazil, Spain and Greece and it was provided that their successors would be chosen by the Assembly. The refusal of the United States to join the League and the admission of Germnny to the League called for a readjustment in the membership of the Council. In 1939 the Council had three permanent members, *viz.*, the Great Britain, France and the Soviet Russia and eleven non-permanent members.

The Council met at least once a year and also from time to time as occasion required. It held its sittings at the seat of the League or at such other place as had been decided upon. Every member of the Council could have only one representative and only one vote. A member of the League not represented on the Council could be invited to any meeting of the Council during the consideration of the matter specially affecting the interest of that member.

Its functions.—The Council, like the Assembly could deal with any matter within the sphere of action of the League or affecting the peace of the world. The scope of its functions could be widened by treaty arrangements. The main function of the Council was the settlement of disputes. Some of its other functions were :—

1. The Council, taking account of the geographical situation and circumstances of each State had to formulate plans for the reduction of armaments for the consideration and action of the States.

2. The Council had to advise how the evil effects of manufacture of munitions and implements of war by private enterprise could be prevented.

3. It had to advise on the ways and means by which the

obligations of the members to respect and preserve as against external aggression the territorial integrity and existing political independence of all the members could be performed.

4. It had to make a report after enquiry on any dispute arising between the members likely to lead to rupture within six months of the submission of the dispute to it.

5. It was the duty of the Council, in case any member of the League resorted to war, to recommend to the several Governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the Covenants of the League.

6. The Council in case of any dispute between a member of the League and a non-member or between States not members of the League, had to institute an enquiry into the dispute and to recommend such action as may seem best and most effectual.

7. The Council was to define the scope of authority control or administration to be exercised by the Mandatory under the Mandate System.

The Secretariat constitution.—It was the permanent administrative organ of the League with Secretary-General at its head. The Secretary-General was appointed by the Council with the approval of the majority of the Assembly. The Secretariat was located at Geneva and consisted of a number of officials constituting the inrernational civil service. The members of the international civil service posted in the Secretariat retained their own nationality. The appointment of the members of the Secretariat was made by the Secretary-General with the approval of the Council.

There were two Deputy Secretaries-General and two Under-Secretaries immediately subordinate to the Secretary-General. The officials of the Secretariat were responsible to the Secretariat itself and they were charged with the duty of compilation and publication on important international problems coming for consideration before the League and for the secretariat work of the Council and the Assembly. The Secretariat was divided into a number of departments.

Defects of the League.—The establishment of the League marked an important event in the history of International

Law and although it was declared by its members to be perfect in every respect to serve the purpose for which it was designed, it suffered from some real defects. Some of these defects may be stated thus :—

1. The Covenant permitted withdrawal from membership after notice. It also provided that a State which recorded its dissent on the question of amendment of the Covenant was liable to forfeit its membership. These provisions gave a wide latitude to the States to break off from the League and greatly contributed to its weakness. It is a matter of history that the League which at one time consisted of 62 members had only 49 members at the close of 1938. After the outbreak of the Second World War it had only 32 members including only one great Power, the Great Britain.

2. The Council was ill-fitted to discharge its function of bringing about pacific settlement of international disputes. The dominant position enjoyed by the Great Powers in the Council prevented the Council from acting impartially in disputes between a small and one of the Great Powers. The Covenant did not provide for an independent body to discharge this function.

3. The Covenant did not make it compulsory for States to go before the Permanent Court of International Justice in case of failure of amicable settlement.

4. The Covenant lacked a provision requiring States to submit the matter of revision of treaties to the Permanent Court for its advice as to whether the treaty had become inapplicable owing to change of circumstances and was likely to be a danger to peace.

5. There were no provisions to deal effectively with aggression by a Great Power and to protect the weak victim.

Position of the League in International Law—The League, the like of which the world had not seen before, enjoyed an unique position in International Law. It was not a State inasmuch as it possessed no territory. It was neither a confederation nor a federation inasmuch as it could not exercise any power over the Member-States except to the extent of enforcing the obligations under the Covenant. It was not a mere alliance as States enter into by treaty for their common interests. It is not possible to place the League into any known category. It

stood as a class by itself and enjoyed an international personality without possessing all the necessary elements of that personality. It possessed certain rights under the International Law. It had the r ight of legation and also the right of exercising sovereignty over territories not subject to the sovereignty of any State. It had the unquestioned right of intervening in the dispute between States and to perform a supervisory function over inter-State relations.

The League had its foundations in the goodwill of the States and owed its existence to the consent of States. It was not super-State but simply an association of nations having for its aim the elemination of all chances of war and the promotion of international co-operation. The Covenant represented an agreement by which the Member-States consented to put a limitation over their undoubted powers with respect to certain matters. The League represented an organization of States governed by the provisions of the Covenant. *Oppenheim* summed up the positions thus :—

> "If looked upon without prejudice, the League appears to be a League absolutely *sui generis*, a union of a kind which has never before been in existence ; and its constitutional organs as well as its functions are likewise of an unprecedented kind. The Covenant of the League is an attempt to organize the hitherto unorganized Family of Nations by a written constitution. In its essence the League is nothing else than the organised Family of Nations."

Causes of its failure.—The Great Powers which brought the League into existence were to a very large extent responsible for its death. Having agreed in a momentary zeal for world peace to shoulder a heavy responsibility they acted in a determined manner to evade their obligations under the Covenant. "The League, being but a method of concerted action could not act against aggressions when its leading actors were determined first to evade their own obligations and second to use the League as a vehicle for appeasing the aggressors. The League perished because its members failed to use it to compel the orderly settlement of disputes and to prevent lawless aggression."[1] The League found itself not strong enough to bring about amicable settlement of International disputes and to prevent the Great Powers from acting in their self-interest to the detriment of weak members.

1. F. L. Schuman.—International Politics p. 314.

The League not being a super-State was not in a position to exercise powers over its members. In case of a member resorting to war in disregard of the Covenant the League could only recommend to the Governments concerned what effective military, naval or air-force the members had severally to contribute to the armed forces to be used to protect the Covenant. It was for the members to act upon this recommendation. If the members were disinclined to do what was recommended by the League, there was nothing in the Covenant to compel them to act in the manner desired by the League. The only penalty provided for violation of the Covenant was expulsion from membership. It would thus appear that the States could conveniently disregard the recommendations of the League.

The influence that the Great Powers wielded in the League and the disputes between any of the Great Powers and a small State could not receive an impartial consideration at the hands of the League. Such state of affairs were bound to shake the confidence of nations. There was also nothing in the Covenant to compel States to obey and act according to the decision of the Permanent Court of International Justice. The decision of that Court could be set at naught by a State at its sweet-will.

The provision for the revision of treaties was very unsatisfactory. The League performed an advisory function in this respect. No penalty was, however, provided for in cases in which the advice of the League for revision of treaties was not acted upon. As a matter of fact the League did not perform this function at all with the result that controversies arising from change of circumstances remained a source of international disputes.

There was no provision in the Covenant for the League's intervention in cases of violations of the rules of warfare laid down by International Law. The absence of such a provision weakened the position of the League.

The following events illustrate the weakness of the League leading to its dissolution :—

(*a*) Some time after the establishment of the League there began the process of withdrawal from membership on the part of small as well as big States. This process continued upto the out-break of the Second World War when the League was left with only one Great Power, the Great Britain

and about 31 smaller States. The withdrawal of States had the effect of weakening the League.

(*b*) In 1923 Italy bombarded and occupied the Greek Island of Corfu. Greece appealed to the League which advised a settlement favourable to Italy and failed to take a strong action against Italian aggression.

(*c*) In 1931 Japan occupied Central Manchuria. China made a representation to the Council. The Council asked Japan to withdraw its troops from Manchuria but Japan paid no heed and continued its operations. The Council again demanded withdrawal of Japanese troops but with no result. A commission was thereupon set up to enquire into the situation. China appealed to the Assembly on the Japanese attack of Shanghai. The Assembly demanded evacuation of Shanghai. Although Japan left Shanghai, it kept its hold on Manchuria by declaring its protectorate over it under a treaty concluded by it with thenew Government which was set up in Manchuria. In the meantime the commission made its recommendations which were adopted by the Assembly. Japan feeling aggrieved left the League to enjoy the fruits of its aggression.

(*d*) The failure of the League of Nations Disarmament Conference, frustrated the very purpose of the League. Germany repudiated the military clauses of the Treaty of Versailles. It began to arm itself with greater vigour and the League was powerless to enforce the provisions of the Covenant relating to disarmament. The Council only adopted a resolution declaring that Germany committed a breach of the Treaty of Versailles, but could do no more. The result was that Germany went on merrily increasing its military strength.

(*e*) The Italian aggression over Ethiopia was too strong to be opposed by the League. Italy attacked Ethiopia in 1935 and the Council was called upon to apply its sanctions. On the recommendations of a commission which had been appointed, the Council declared that the Italian invasion of Ethiopia was in disregard of the Covenant of the League. This was approved of by the Assembly. The League applied economic sanctions against the aggressor. Italy remained undaunted and conquered Ethiopia. The Emperor of Ethiopia fled and with all the force at his command appealed to the League. Great Britain and France not inclined to displease Italy were determined to oppose Ethiopia. The League

failed to do its duty and Ethiopia was left to her fate. Great Britain and France gave recognition to the Italian conquest of Ethiopia.

(*f*) The Soviet Russia attacked Finland in 1939 and the appeals of Finland to the League brought no good result. Argentina demanded expulsion of Russia. The Assembly unanimously accepted the Argentina proposal. The Council also approved the action and Russia was expelled.

CHAPTER XXX

THE UNITED NATIONS ORGANISATION

ORIGIN

1. **Atlantic Charter.**—During the Second World War great nations became alive to the necessity of the establishment of a powerful organization of States for the purpose of securing peace and promoting international co-operation and good-will. In their anxiety to lay the foundation of such an organization the President of the United States of America and the Prime Minister Winston Churchill met in conference on board the ship *Prince of Wales* in the Atlantic Ocean in 1941. They issued a joint statement which has become famous and is known as the Atlantic Charter envisaging 'the establishment of wider and permanent system of general security.' This Charter recognised the right of common man to be free from fear and want. It laid stress on the fact that permanent world peace could only be acquired if man was guaranteed freedom from fear, freedom from want, freedom of information.

2. **United Nations Declaration.**—This Charter was followed by the Declaration of the United Nations on January 1, 1942 when a number of States pledged themselves to make a joint effort to win the war and to establish world peace. This declaration approved of the principal aims and objects of the Atlantic Charter.

3. **Moscow Conference.**—The Moscow Conference of October, 1943 resulting in the famous Moscow Declaration recognised 'the necessity of establishing at the earliest practicable date a general international organization, based on the principles of the sovereign equality of all peace loving States,

and open to membership by all such States, large and small for the maintenance of international peace and security.'

4. **Dumbarton Oaks Conference.**—Acting upon the Moscow Declaration the delegates of Great Britain, the United States and the Soviet Union met at conference at Dumbarton Oaks in Washington from August 21, 1944 to September 28, 1944. This conference adopted proposals now known as Dumbarton Oaks Proposals for the establishment of an international organization. After a second meeting which took place between the representatives of Great Britain, the United States and China the Dumbarton Oaks Proposals were sent for approval of the four States viz., Great Britain, the United States, the Soviet Union and China. These proposals were later on communicated to other States which had signed the Declaration of United Nations in 1942.

5. **The San Francisco Conference.**—The United Nations Conference at which in the first instance two nations partici-pated met at San Francisco on April 25, 1945 for establishing an international organization.

This conference concluded its deliberations on June 26, 1945 when the 'Charter of the United Nations' was adopted by the States represented at the Conference. The Charter after ratification by various Governments came into force on October 24, 1945. The General Assembly of the United Nations Organization began functioning from January 10, 1946 when its first meeting was held in London. In this way this mighty organization known as the United Nations Organization or simply the U. N. O. came into existence. The League of Nations was consequently dissolved by a resolution of its last Assembly in April 1946.

The United Nations and the League.—The horrors of the First World War roused the nations to unite under a world organization for the purpose of minimizing the chances of war. The League of Nations which was formed at the conclusion of the First world War held out good hopes of permanent peace but ultimately it failed to secure the object. The Second World War proved beyond doubt the weakness of the League and its incapacity to prevent war. It emphasized the necessity of the establishment of a more powerful organization. The United Nations having succeeded the League aspires to be successful where the League failed. A close study of the principles and objects of the two institutions will show that the United Nations is a great improvement upon the defunct League. Notwith-

standing the fact that the United Nations has the same principle and purpose as the League; there are fundamental differences between the two. The points of difference between the United Nations and the League are :—

(*a*) The preamble of the Charter of the United Nations is significant and materially differs from that of the League. The League was resolved upon by the High Contracting Parties that is to say, the Governments of the participating States while the Charter represents the determination of the peoples of the United Nations and is democratic in nature The peoples of the United Nations have shouldered the responsibility of preventing the recurrence of war.

(*b*) The League Covenant in Articles 12, 13 and 15 carefully specified the obligations of the member States while the Charter sets forth the obligations of the members of the United Nations in general terms in Article 2.

(*c*) The League had apart from its Secretariat two principal organs only *viz.*, the Assembly and the Council and both of these organs could deal with matters within the sphere of action of the League and affecting the peace of the world. The United Nations has besides, the Secretariat five principal organs *viz.*, The General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the International Court of Justice. The functions and the powers of all these organs are well defined in the Charter. The functions of the Assembly and the Council under the League Covenant were not clearly specified.

(*d*) The fact that the Charter of the United Nations providing for an Economic and Social Council as one of the principal organs of the Organization shows that the United Nations pays greater attention to the international economic, social, cultural, educational and health problems than the League.

(*e*) The League Covenant made a provision for the withdrawal of a member after two years' notice of its intention to do so. The Charter of the United Nations does not expressly provide for withdrawal of the Members of the United Nations.

(*f*) The Charter of the United Nations provides for more effective methods for the prevention of war or threat of war. The Security Council has to determine whether the situation constitutes a threat to peace and if so what methods must be

taken to maintain the peace. The Security Council may call upon the parties to comply with provisional measures proposed by it. In case there is non-compliance with the provisional measures the Security Council will decide upon measures not involving the use of armed forces; but if these measures also prove inadequate the Security Council will then take such action by air, sea or land forces as may be necessary to maintain or to restore international peace and security. The provision for a Military Staff Committee in the Charter to advise and assist the Security Council on all questions relating to the armed forces placed at the disposal of the Council is another important feature of the organization.

(*g*) The question whether or not a situation calling for an enforcement action has arisen is to be decided under the Charter by the Security Council and also by the General Assembly in pursuance of "Uniting for Peace" resolution adopted on November 3, 1950. This question had to be decided by each Member of the League in the Covenant. Under Article 15 of the Covenant a party to a dispute likely to lead to rupture and not submitted for peaceful settlement was required to give notice of the existence of such a dispute to the Secretary-General who was to make proper arrangement for investigation and consideration.

(*h*) The enforcement action under the Charter is required to be taken on the decision of the Security Council which was binding on the Members. The General Assembly is also entitled under the 'Uniting for Peace' resolution to recommend the enforcement measures to the Members. The Covenant provided for the taking of enforcement actions not involving the use of armed forces by the Members. The Council under the Covenant could only make recommendations with regard to enforcement action involving use of armed forces.

(*i*) The Charter provides for the maintenance of armed forces at the disposal of the United Nations for the purpose of taking an effective enforcement action to restore international peace and security. The Covenant of the League provided for no such thing.

(*j*) The Charter differs from the Covenant in the helplessness of the Security Council to take an enforcement action against a permanent Member of the United Nations Organization, because the decision of the Security Council on all but procedural matters has to be made by an affirmative vote of seven Members including the concurring votes of the permanent

Members. The Covenant provided no such rule and the Origninal Members of the League had no such right of vetoing.

(*k*) The Covenant provided that a treaty or international engagement entered into by any Member of the League but not registered with the Secretariat would not be binding. The Charter in Article 102 provides that no party to any treaty or international engagement which has not been registered with the Secretariat is permitted to invoke that treaty or international engagement before any organ of the United Nations.

(*l*) The procedure laid down in the Charter for the adoption of amendments differs from that of the League Covenant. The Covenant required an unanimous resolution in respect of an amendment. The Charter provides for the adoption on an amendment by the vote of two-thirds of the members of the General Assembly which may not necessarily include the votes of the members of the Security Council. The Covenant provided for the rule that the amendment did not bind the dissenting member State and that the dissenting State ceased to be Member of the League. The Charter does not provide expressly for a dissent or consequent cessation of membership.

(*m*) The League Covenant guaranteed the territorial integrity and political independence of the Member-States. The Charter instead of providing for any such guarantee places an obligation on the members to refrain from threat or use of force against territorial integrity or political independence of any State.

The Charter and its provisions.—Having noted the broad points of difference between the United Nations and the League it is necessary to examine the various provisions of the Charter:—

(*A*) **The Preamble of the Charter**:—The Preamble expresses the ends in view, the means whereby those ends are to be achieved, and lastly the determination or resolution to combine efforts to accomplish the aims. The aims in view are (1) to save succeeding generations from the scourge of war (2) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, (3) to establish conditions under which justice and respect for obligations arising from treaties or other sources of International Law can be maintained and (4) to promote social progress and better

standards of life in larger freedom. The means chalked out by the Charter for the achievement of the aforesaid aims are (1) to practise tolerance and live together in peace with one another as good neighbours:, (2) to unite strength to maintain international peace and security ; (3) to ensure that armed force shall not be used save in common interest ; (4) to employ international machinery for the promotion of the economic and social advancement of all peoples. Then follows the resolution of the peoples of the United Nations to combine efforts to accomplish these aims.

(*B*) **The purposes of the United Nations** :—Article 1 of the Charter mentions the purposes of the United Nations under four heads :—(1) to maintain international peace and security by adopting collective measures for the prevention and removal of threats to the peace and for bringing about the peaceful settlement of international disputes ; (2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ; (3) to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all; 4) to be a centre for harmonising the actions of nations in the attainment of these common ends. It is significant to note that the Charter aims at international cooperation for the promotion of respect for human rights and fundamental freedoms.

(*C*) **Directive Principles of the United Nations** :—Article 2 of the Charter sets forth the principles on which the Organization and its Members are to act. These principles are :—

1. The Sovereign equality of all the members of the United Nations. The Principle is further strengthened by the provision that 'nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter'. But this principle is not meant to prejudice the application of enforcement measures under Chapter VII.

This principle of Sovereign equality of all members, it may be noted, has not been adhered to throughout. A close study of the various provisions of the Charter will show that a distinction has been made between the Five Great Powers which are the permanent members of the Security

Council and other members of the United Nations. The consent of the Great Powers, the permanent members of the Security Council is needed for amendments of the Charter; for admission of new members, for decision and recommendation in connection with the settlement of disputes and safeguarding international peace and security and in many other cases.

The Charter in providing for the concurrence of permanent members in the decision of all but procedural matters makes it impossible for the Security Council to take an enforcement action against a permanent member. This provision is inconsistent with the principle of equality reaffirmed in the Charter. As no permanent member against which an enforcement action is proposed to be taken can record its vote in favour of the action against itself, the Security Council cannot make any decision with regard to an enforcement action against a permanent member. Here lies an important inequality.

"Uniting for Peace" Resolution.—The *"Uniting for Peace"* resolution of November 3, 1950 by which the General Assembly is, in case the Security Council by reason of the lack of unanimity of the permanent members fails to exercise its primary responsibility of maintaining peace, entitled to consider the matter immediately with a view to making appropriate recommendations for collective measures. The consequences following clear departure from the principle of equality in the Charter have been mitigated by the "Uniting for the Peace" resolution.

2. The obligation of the members of the Organization to settle their disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

3. The duty of all the members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.

4. The duty of all Members to give every assistance to the United Nations in any action it takes in accordance with the present Charter and to refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

5. Mutuality of benefits and obligations under the Charter.

The members have pledged themselves to fulfil in good faith the obligations assumed by them in accordance with the present Charter in order to ensure to all the members the rights and benefits resulting from membership.

6. The right of intervention of the United Nations in relation to non-member-States.—

The Charter puts an obligation on the United Nations to ensure that States which are not members of the United Nations act in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security.

7. The non-interference of the United Nations in matters which are essentially within the domestic jurisdiction of any State.—

This principle will not be adhered to. in cases in which the Security Council in pursuance of the provisions of Chapter VII of the Charter proceeds to take measures of enforcement after having determined the existence of any threat to the peace, breach of peace or act of aggression.

(*D*) **Membership of the United Nations.**—The Charter makes a distinction between States which are original members of the United Nations and those which became members subsequently. The Original Members are those States which either took part at the San Francisco Conference or having previously signed the Declaration of the United Nations of January 1, 1942 signed and ratified the Charter. The Charter lays down that membership is open to all other 'peace-loving States' which accept the obligations of the Charter and which are in the judgment of the organization able and willing to carry out these obligations. The General Assembly upon the recommendations of the Security Council has to decide whether a particular State is qualified to be a member of the United Nations.

A State admitted to membership of the United Nations may be expelled on the ground of persistent violation of the principles contained in the Charter. The expulsion from membership is to be ordered by the General Assembly on the recommendation of the Security Council. Further, the General Assembly can on the recommendation of the Security Council order suspension from membership of a State against which preventive or enforcement action has been taken by the Security Council. The State against which an order of suspension has been passed cannot exercise its rights and privileges of membership.

The Charter is silent with regard to the right of a member of the United Nations to withdraw from the Organization. There is neither a permission to withdraw nor a prohibition against withdrawal from the organization. "Although the Charter itself does not expressly mention the right of withdrawal, in the absence of an express prohibition to that effect the members of the United Nations must be deemed to have preserved the right to sever what is, in law, a contractual relation of indefinite duration imposing upon States far-reaching restrictions of their sovereignty. Moreover the relevant Committee of the 'San Francisco Conference put on record the view, eventually accepted by all the participating States; that nothing in the Charter deprives members of the right to withdraw from the Organization.'[1]

(*E*) **Legal Character of the United Nations.**—The United Nations so closely resembles the League of Nations in its structure and functions that a discussion of the legal character of the League will help us in understanding the legal character of the United Nations. The opponents of the League called it a 'Super State' implying that the States which were members of the League had lost their Sovereignty and independence and the League became the repository of all sovereignty and independence. There is no doubt that the membership of the League imposed some restrictions on the States but that could not amount to loss of either sovereignty or independence and could not make the League a 'super-State' in the above sense. The League in view of the provisions of the Covenant that important decisions of the Assembly and the Council could not be reached without unanimous vote of all the members was not in a position to take any important decision in the teeth of opposition of any State. The League thus could not be deemed to be a super-State. Leading Jurists of Germany, France and England took the view that the League was a confederation—a loose Union of States associating for certain specific purposes without depriving themselves of their sovereignty and independence. Another view that prevailed was that the League was simply an organ of the community of nations for performing certain functions in the common interest of the members of the League. Whichever view is taken the League undoubtedly had a legal personality of its own apart from that of the individual members. As a corporate body the League was capable of taking property in its own name, of entering into contracts and of acquiring rights and assuming responsibilities.

1. Oppenheim—International Law Vol. I (Seventh Edition) p. 373.

The legal position of the United Nations is nearly the same as was enjoyed by the League. The various provisions of the Charter give a clue to the legal position of the United Nations. Aritcle 104 provides that the Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. Article 43 provides for agreements between the Security Council and the members of the Organization concerning armed forces and other forms of assistance for the purpose of maintaining peace and security. Further, Article 81 of the Charter authorises the United Nations to exercise jurisdictional and legislative powers with regard to such trust territory as may by a trusteeship agreement be placed under the authority of the Organization itself. These and other provisions running throughout the Charter leave no doubt that the Organization has a legal personality of its own apart from that of the members of the United Nations. The International Court of Justice in rendering advisory opinion in the case of the Reparation for injuries incurred in the service of the United Nations held that the United Nations though not a 'super-State' was an international person competent to bring an action against both a member and non-member for damages caused to itself or to any of its agents. The difficulty, however, arises when we try to place the United Nations Organization into a particular class of composite States known to law. The question that perplexes is :—Whether it is a confederation, a federation or a federal State ? According to *Oppenheim* the United Nations approximates more closely to a confederation than to a Federal State. "This is so in particular in view of the right of withdrawal from the organization, of the practical non-existence of any true legislative powers vested in the United Nations and of the virtual absence of any direct relation between the United Nations and the nationals of the member-States.'[1]

The United Nations Organization which is unique in character can hardly fit in any of the old categories of composite States and is entirely a new kind of international person. It enjoys a legal personality and stands as a class by itself. Fenwick sums up the position thus: "But apart from the classification of political science it is clear that the United Nations like its predecessor the League of Nations is to have a definite legal personality a corporate character of its own apart from that of its individual members. Like the League it will be able to take title to the property in its own name; it will be able to

1. Oppenheim.—International Law Vol, I p.384.

enter into contracts as a corporate body and acquire rights and assume obligations, it will be able to administer public International services and to act as trustee for individual States; it will be able to govern territory through its designated agents and to act as guardian and protector of a dependent International person.' [1]

It can be hardly doubted that the United Nations possesses international personality. It has the capacity to enter into international agreements. Its international personality carries with it the competence to appear before international tribunals. The United Nations can sue in the municipal courts of its Member-States, as permitted by the provisions of Article 104 of the Charter and the Convention of 1946 on the Privileges and Immunities of the United Nations. In the case of the Reparation for injuries suffered in the service of the United Nations the International Court of Justice gave a judicial recognition to the international personality of the United Nations. "In Reparation for injuries suffered in the service of the United Nations, the International Court of Justice recognised the capacity of the United Nations to press a claim before an international tribunal against either a member or a non-member State. This right is limited by Article 34 (1) of the Statute of the International Court of Justice which declares that only States may be parties in cases before the Court. In the Reparation case the Court specially asserted that the personality of the United Nations does not derive from a position as a super-State but rather that it is one among many international persons. The personality of the United Nations is derived from and limited by its functions; in no way is it a matter of national right."[2]

It must however be borne in mind that although the United Nations possesses international personality it has not all the attributes of a State. A State has sovereign powers within its territory. The United Nations does not possess territory and has no sovereign powers. It is a creature of an international agreement and its activities are defined by the Charter—the constitution. The United Nations has to perform functions which are either expressed in the Charter or which may be implied from the objects for which it has been established. The International Court of Justice in the case of the Reparation for injuries suffered in the service of the United Nations

1. Fenwick.—International Law pp.182, 183.

2. Gould.—An Introduction to International Law p. 204.

drew a distinction between the United Nations and a State thus:

"Whereas a State possesses the totality of international rights and duties recognised by International Law, the rights and duties of an entity such as the organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."

(F) **The organs of the Organization and their constitution and functions.**—The principal organs of the Organization are the *General Assembly*, the *Security Council*, the *Economic and Social Council* the *Trusteeship Council*, the *International Court of Justice*, and the *Secretariat*. The Charter makes provision for the establishment of subsidiary organs which may be distinguished from specialized agencies that may be set up under inter-Governmental agreements. The subsidiary organs are to be set up by the Security Council or the General Assembly. The constitution and function of the various principal organs may now be noticed.

A—GENERAL ASSEMBLY

Its Organization.—The General Assembly is the central organ of the United Nations and consists of all the members of the United Nations. It has its own rules of procedure including rules governing the public character of its proceedings. It elects a president and seven vice-presidents for each session. The Assembly discharges most of its functions through committees, which are of four kinds: Main Committees, Procedural Committees, Standing Committees and *Ad Hoc* Committees.

1. **Main Committees.**—The main Committees to which every member has a right to be represented are six in number and each of these has its own Chairman. The sphere of activities of each of these committees is well defined.

2. **Procedural Committees.**—The procedural Committees are two in number: General Committee and the Credentials Committee. The president and the seven vice-presidents of the General Assembly together with the six chairmen of the Main Committees constitute the General Committee which has the power of co-ordination but which has no power to decide political questions. The Credentials Committee has only nine members. Both these committees deal with the organization and the conduct of the business of the General Assembly.

3. **Standing Committees.**—Standing Committees are: Advisory Committee on administrative and budgetary ques-

tions which is compsed of nine members and which examines the budget, and the Committee on contributions which consists of ten members and which decides annually how the contributions to the budget is to be assessed.

4. Ad Hoc Committees.—*Ad Hoc* committees are appointed for special purposes by the General Assembly and by the various committees of the Assembly. The United Nations Special Committee on the Balkans and the United Nations Commission for the Relief and Rehabilitation of Korea are examples of such *Ad Hoc* Committees.

5. Other Subsidiary Bodies.—Besides these committees there are subsidiary bodies established under the General Assembly. The International Law Commission and peace observation commission are two such subsidiary bodies.

The General Assembly meets in regular annual sessions and in such special sessions as occasion may require Special sessions are convoked by the Secretary-General at the request of the Security Council or of a mojority of the members of the United Nations.

Voting Procedure.—Each member of the United Nations has one vote in the General Assembly. Each member has not more than five representatives in the General Assembly. A member forfeits its right of vote in the General Assembly if it has failed to make payment of the amount of contribution due from it for the preceding two full years or more. The General Assembly may, however, authorise the defaulting member to vote if it is satisfied that failure to pay is due to conditions beyond the control of the member. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. The important questions include recommendations with respect to maintenance of international peace and security, the election of non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of the members of the Trusteeship Council, the admission of new member to the United Nations, the suspension of the rights and privileges of membership, the expulsion of members, question relating to the trusteeship system and budgetary questions. Decisions of the General Assembly on other questions including determination of additional categories of questions to be decided by a two-thirds majority shall be by a majority of members present and voting.

Functions and Powers of the General Assembly.—The functions of the General Assembly are:—(*a*) It may discuss any question or matter within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter and may make recommendations to the members of the United Nations or to the Security Council or to both on any such question or matter. But the General Assembly will not make any recommendations on any dispute or situation with respect to which the Security Council is exercising its functions unless the Security Council so requests.

(*b*) The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security including the principles governing disarmament and the regulation of armaments and may make recommendations with respect to such principles to the members or to the Security Council or both.

(*c*) The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by the member or the Security Council or even by a non-member and may make recommendations thereon to the States concerned or to the Security Council or both. Any such question on which action is necessary is to be referred by the General Assembly to the Security Council either before or after discussion.

(*d*) The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

(*e*) The General Assembly shall initiate studies and make recommendations for the purpose of promoting international cooperation in the economic, social, cultural, educational and health fields and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

(*f*) The General Assembly may recommend measures for the peaceful adjustment of any situation regardless of origins, which it deems likely to impair the general welfare or friendly relation among nations including situations arising from a violation of the provisions of the Charter.

(*g*) The General Assembly shall receive and consider annual and special reports from the Security Council containing an account of the measures decided upon or taken to maintain

international peace and security. It shall also receive and consider reports from the other organs of the United Nations.

(*h*) The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it including the approval of the trusteeship agreements for areas not designated as strategic.

(*i*) The General Assembly shall consider and approve the budget of the Organization and shall also apportion among the members the expenses of the Organization. It shall also consider and approve any financial and budgetary arrangements with specialized agencies and shall examine administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

(*j*) The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

B—THE SECURITY COUNCIL

Composition.—The various provisions of the Charter with regard to the Security Council leave no room for doubt that the Council is primarily an organ for preserving international peace and security.

The Security Council consists of five permanent and six elected members of the United Nations. The five permanent members are the Republic of China, France, the Union of Soviet Socialist Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The six non-permanent members are to be elected by the General Assembly for two years. In electing these non-permanent members the General Assembly shall have regard in the first instance to the contribution of the members of the United Nations to the maintenance of international peace and security and to the purposes of the Organization and also to equitable geographical distribution. Each member of the Security Council shall have one representative and shall be entitled to only one vote. Any member of the United Nations which is not a member of the Security Council may participate in the discussion of any question brought before the Security Council if in the opinion of the Council the interests of that member are specially affected. But that member will not have a right of voting in the Security Council. A member of the United Nations which is not a member of the Security Council or a

State which is not a member of the United Nations if it is a party to the dispute under consideration of the Security Council shall be invited to participate without vote in the discussion relating to that dispute. The Security Council is authorised to lay down condition which it may deem just for the participation of a State which is not a member of the United Nations.

The Security Council unlike the General Assembly is to be so organised as to be able to function continuously and for this purpose each member is to be represented at all times at the seat of the Organization. There is also provision for holding the meeting of the Council at other places than at the seat of the Organization if the Council considers it expedient to do so. The Security Council has its own rules of procedure including the method of selecting its president.

Voting Provisions.—The voting provision as contained in Article 27 of the Charter has come to be known as 'Yalta voting formula.' Matters coming before the Security Council are to be divided in two groups *viz.* 'procedural matters' and 'all other matters'. In respect of 'procedural matters' decisions are to be made by the affirmative vote of any seven members. But in respect of all other matters the decision of the Security Council shall be made by an affirmative vote of seven members including the concurring votes of the permanent members. In decisions relating to pacific settlement of disputes under Chapter VI and in decisions under Article 51 paragraph 3 dealing with the settlement of local disputes through regional arrangements or by regional agencies a party to the dispute has to abstain from voting.

Functions and Powers :—The functions of the Security Council are of executive nature and are primarily in connection with the maintenance of international peace and security. Under Article 24 the members of the United Nations have, in order to ensure prompt and effective action, thrown on the Security Council primary responsibility for the maintenance of international peace and security. The act of the Security Council under this responsibility is to be done in accordance with the purposes and principles of the United Nations. The various functions and powers of the Security Council are :—

(*a*) The Security Council shall, when it deems necessary call upon the parties to settle their disputes by peaceful means.

(*b*) The Security Council may investigate any dispute or

any situation which might lead to international friction or give rise to a dispute in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. This investigation may be made at the instance of any member of the United Nations.

(*c*) The Security Council may recommend appropriate procedure or method of adjustment with regard to a dispute. In making these recommendations the Security Council should take into consideration any procedures which have already been adopted by the contesting parties and also the fact that as a general rule legal disputes are to be referred to the International Court of Justice.

(*d*) The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make its recommendations or decide what measures are necessary to maintain or restore international peace and security.

(*e*) The Security Council in order to prevent an aggravation of the situation may recommend or decide upon provisional measures and call upon the parties to comply with such provisional measures as it may deem desirable. The Security Council shall take account of the failure to comply with such provisions.

(*f*) The Security Council is to decide as to what measures not involving the use of armed forces are to be taken to give effect to its decisions and may call upon the members of the United Nations to apply such measures.

(*g*) The Security Council, if it thinks that measures taken by it for the purpose of giving effect to its decisions, have proved to be inadequate may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.

(*h*) The Security Council may call upon the members of the United Nations to make available to it armed forces, assistance and facilities including right of passage in respect of which the members have entered into agreements or special agreements with the Security Council.

(*i*) The Security Council shall make plans for the application of armed force with the assistance of the Military Staff Committee.

(*j*) The Security Council shall encourage the development of pacific settlement of local disputes through regional arrangements or by regional agencies.

(*k*) The Security Council shall exercise all functions of the United Nations relating to strategic areas including the approval of the terms of the Trusteeship agreements and of their alteration or amendment.

(*l*) The Security Council shall subject to the provisions of the Trusteeship agreements and without prejudice to security considerations avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the Trusteeship system relating to political, economic, social and educational matters in the strategic areas.

(*m*) The Security Council shall submit annual and when necessary special reports to the General Assembly for its consideration.

(*n*) The Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee, plans to be submitted to the members of the United Nations for the establishment of a system for the regulation of armaments.

(*o*) The Security Council has to make recommendations to the General Assembly in the matter of admission of a State to the membership of the United Nations and in the matters of suspension or expulsion of a member.

(*p*) The Security Council is to take part in the appointment of the Secretary-General and of the Judges of the International Court of Justice.

The Subsidiary organs of the Security Council

1. The Military Staff Committee—The function of this Committee is to advise and assist the Security Council on all questions relating to the Security Council's military requirements for maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments and possible its disarmament The Committee is responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council.

The Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. The Committee shall invite any member of the United Nations

not permanently represented on the Committee when the efficient discharge of the Committee's responsibilities requires the participation of that member in its work.

2. **The Atomic Energy Commission**.—This Commission was set up by the General Assembly in 1946 and consists of all the members of the Security Council and Canada. The function of commission consists in making proposals for scientific use of atomic energy for peaceful means, for the elimination of atomic energy as a weapon of warfare, for providing safeguards for protection of the States against the use of atomic energy as a weapon of warfare, and in dealing with matters connected with atomic energy.

3. **The Commission for Conventional Armaments.**—This Commission is composed of representatives of the eleven members of the Security Council. The function of the commission is to make proposals for general regulation of armaments and armed forces. It does not deal with matters which come within the sphere of the Atomic Energy Commission.

4. **Standing Committees.**—There are two Standing Committees each of which consists of eleven members of the Security Council. One of the committees is the Committee of Experts which deals with rules and procedures to be followed by the Security Council and the other, the Committee on Admission of New Members deals with the matters of admission of new members to the United Nations.

5. **Ad Hoc Committees and Commissions.**—The Security Council when it cosiders necessary appoints *Ad Hoc* Committees and Commissions for some specified matter. The function of these Committees and Commissions is to deal with matters entrusted to them.

Relation of Security Council with the General Assembly.—It would appear from the above discussion of the functions and powers of these two important organs of the United Nations that while the General Assembly is a deliberative body, the Security Council which is specifically charged with maintenance of international peace and security is an executive organ. The very nature of the primary function of preserving peace and security makes the Security Council a more important political organ than the Assembly. Although the Security Council has to submit reports of its activities to the General Assembly it is supreme within the sphere of its power for there is nothing in the Charter which authorises the General Assembly to override the decisions taken by Security

Council. The main activities of the Security Council and General Assembly are entirely different. But there are many matters in which both these organs are required to cooperate in fulfilment of the object of the Organization.

The Member-States in Article 24 of the Charter confer on the Security Council primary responsibility for the maintenance of international peace and security and the Security Council carries out the duties on behalf of the Member-States. But this responsibility is not exclusive, as the General Assembly is competent to discuss and make recommendations on matters of international peace and security. The Security Council has to submit annual and when necessary, special reports to the General Assembly for its consideration. The General Assembly is competent to take action on matters of international peace and security whenever the Security Council by reason of the veto of some of its members cannot take an effective decision. The historical events of the last Korean war found the Security Council almost paralysed and the General Assembly established a Peace Observation Committee to watch the events and make timely reports and also a Collective Measures Committee of fourteen members to study and report on the measures necessary to meet the situation. The General Assembly undertook to consider the recommendations for collective security and passed a resolution entitled 'Uniting for Peace' in exercise of its full authority. The actions taken by the General Assembly in the Korean War demonstrate the strength of the General Assembly in matters for which the Security Council though primarily responsible is unable to effectively deal with the situation by reason of the veto of its members. "The General Assembly took unto itself the power to consider recommendations for collective measures whenever tbe Security Council's Permanent Members are divided and thereby prevent the Security Council from meeting its responsibility. By adding to the powers accorded to it by the Charter to make recommendations in threatening situations, the General Assembly endeavoured to become something more than a forum for the expression of official opinion. The action taken to meet the Korean situation is of primary significance as an indicator of ways and means by which the Members can avoid complete frustration by the veto-ridden Security Council."[1]

There is no doubt that the General Assembly is the "town-meeting of the world" and provides a forum where every

1. Gould :—An Introduction to International Law p. 570.

State large and small meets and takes part in the discussions on issues of international policy. Its authority is confined to discussions and recommendations and it cannot displace the Security Council which alone has the authority to order the Member-States to meet breach of international peace and acts of aggression. The power of the General Assembly in respect of discussions and the recommendations has two limitations, firstly, it cannot make recommendations with regard to a dispute which has already been taken up by the Security Council in exercise of the functions assigned to it in the Charter unless the Security Council so requests ; secondly, it must refer to Security Council either before or after discussion such questions in which action is necessary. During the Korean War an objection was raised that the General Assembly not being an 'active' organ could not recommend an 'action' and that an 'action' could only be ordered by the Security Council. This objection was repelled by the majority of the States on the ground that the General Assembly being bound to carry out the purposes of the United Nations 'to maintain international peace and security and to that end to take effective collective measures' was not restricted in recommending action while the Security Council was incapable of discharging its primary functions by reason of the veto of its permanent Members. Thus the resolution entitled 'Uniting for Peace' was passed by a majority vote and gave a recognition to the fact that there was nothing wrong in the General Assembly recommending to the members an action for repelling aggression. "Whatever the rights or wrongs of the legal debate over consistency with the letter of the Charter, it cannot be deenied that 1950 marked a great shift in the centre of gravity of the United Nations. The General Assembly has now assumed a large part of the authority which in the original conception was to be exercised by the Security Council. It has done this reluctantly and in stages, but the effect on the balance of authority in the United Nations is unmistakable."[1]

C—THE ECONOMIC AND SOCIAL COUNCIL

Composition.—This Council is subordinate to the General Assembly and acts as its agent in certain functions. It consists of eighteen members elected by the General Assembly six of whom are to be elected each year for a term of three years. In other words six members are to retire each years. Each member shall have one representative

1. Fuller :—United Nations and World Community p. 39-40.

and shall be entitled to one vote. The decisions of this Council shall be made of a majority of the members present and voting. This Council may require any member of the United Nations to participate without voting in its deliberations on any matter of peculiar concern to that member. The Council shall follow its own rules of procedure including method of selecting its President. The Council shall meet in accordance with its rules.

Functions.—The functions of the Economic and Social Council are :—

(*a*) It may make or initiate studies and report with respect to International economic, social, cultural, educational, health and related matters and may make recommendations with respect to any such matters to the General Assembly, to the members of the United Nations and to the specialised agencies concerned.

(*b*) It may make recommendations for the purpose of promoting respect for and observance of, human rights and fundamental freedoms for all.

(*c*) It may prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence.

(*d*) It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence

(*e*) The Council may enter into agreements with any of the specialized agencies provided for in the Charter defining the termes on which the agency concerned shall be brought into relationship with the United Nations subject to the approval of the General Assembly.

(*f*) It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the members of the United Nations.

(*g*) It may furnish information to the Security Council and shall assist the Security Council upon its request.

(*h*) It shall perform such functions as fall within its competence in connection with the carrying out of the recommendation of the General Assembly.

(*i*) It may with the approval of the General Assembly perform services at the request of the Members of the United Nations and at the request of specialized agencies.

D—THE TRUSTEESHIP COUNCIL

In order to understand the character and function of the Trusteeship Council is necessary to grasp the principles of the trusteeship system contained in the Charter. The United Nations have undertaken the task of establishing an international trusteehip system for the administration and supervision of such territories as may be placed thereunder by subsequent agreements. The territories so placed are to be called trust territories. The trusteeship system of the United Nations is a substitute for the Mandate system of the League and as the basic idea of the two systems is the same, a study of the mandate system will be useful in understanding the new trusteeship system.

The Mandate System.—The Mandate System was devised at the end of the First World War for the purpose of dealing with certain territories which had been detached from Turkey and Germany as a result of the war. This novel system was embodied in Article 22 of the Covenant of the League forming part of the Treaty of Varsailles. This system provided that the detached territories would not be owned by any States but would be administered by certain States called the mandatory States on behalf of the League on terms and conditions laid down in an agreement entered into by the mandatory State with the League. The agreements were known as mandates. The detached territories were called mandated territories.

The mandate system was based on the principle 'that the well-being and development of the people who inhabited those territories and who were not yet able to stand by themselves under the strenuous conditions of the modern world formed a sacred trust of the civilization.' It would thus appear that the territories did not belong to any particular State and they were to be administered by the mandatory States under the supervision and control of the League of Nations on terms expressly mentioned in the Mandate. The League was advised and assisted by the permanent Mandates Commission which was primarily responsible for the working of this system. The inhabitants of the mandated territories had a right to petition the League. The mandatory States were in the position of trustees administering trust property. They had

to submit annual reports of their administration to the League.

The territories which were to be administered under the mandate system were grouped under three types of mandates according to the political advancement attained by each of them. Under class A Mandate came territories formerly belonging to the Turkish Empire which had reached a stage of development where their existence as independent nations could be provisionally recognised but which required administrative advice and assistance of Mandatory States until such time as they could stand alone. Iraq and Palestine which were entrusted to Great-Britain and Syria and Lebanon which were entrusted to France were grouped under Mandate A. The conditions under which these territories were to attain political independence were expressed in the mandates.

Territories under Mandate B were those which were not politically developed and with respect to which it was necessary that the mandatory States should be responsible for their administration under conditions which will guarantee freedom of conscience and religion subject only to the maintenance of public order and morals ; the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic ; and the prevention of the establishment of fortifications or military and naval bases and of the military training of the natives for other than police purposes and the defence of the territory. British Cameroons, British Togoland and Tanganyika which were entrusted to Great Britain, French Camerooms and French Togoland, which were entrusted to France and Ruanda Urundi which was entrusted to Belgium were placed under Mandate B.

Mandate C was applicable to those territories which owing to the sparseness of their population, or their small size or their remoteness from the centres of civilization, or their geographical contiguity to the territories of the Mandatory and other circumstances could only be administered under the laws of the Mandatory as integral portions of its territory subject to certain safeguards. These territories were :—South West Africa entrusted to Union of South Africa, Samoa entrusted to New Zealand ; Nauru to British Empire (Great Britain, Australia and New Zealand jointly), other Pacific Islands South of the Equator to Australia, Pacific Islands North of the Equator to Japan.

The Trusteeship System.—The framers of the United Nations Charter accepting the principle underlying the mandate system of the League set up a new machinery and styled it as

trusteeship system. The objects of the trusteeship system are:—

1. To further International peace and security.
2. To promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government and independence.
3. To encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion and to encourage recognition of the inter-dependence of the peoples of the world.
4. To ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals and also equal treatment for the latter in the administration of justice.

Territories which may be placed under the trusteeship agreement are:—

(*a*) Territories hitherto held under the mandate system of the League;

(*b*) Territories which may be detached from enemy States as a result of the Second World War; and

(*c*) Territories voluntarily placed under the system by States responsible for their administration.

The Charter provides for trusteeship agreements for the purpose of bringing territories under the trusteeship system. The terms of Trusteeship agreement for each territory to be placed under the system shall be agreed upon by the States directly concerned and approved either by the Security Council in case of strategic areas or of the General Assembly in case of the other territories. The Trusteeship agreements shall in each case include the terms under which the trust territory will be administered and designate the Authority which will exercise the administration of the trust territory. The State or States which exercise the administration of the trust territories are called Administering Authority. The duty of the Administering Authority shall be to ensure that the trust territory shall play its part in the maintenance of international peace and security.

The Trusteeship Council.—The Trusteeship Council operates under the authority of the General Assembly in furtherance of the objective of the Trusteeship system. The Trusteeship Council consists the following members :—

(1) Members of the United Nations which are administering trust territories ;

(2) Those permanent Members of the United Nations which are not administering trust territories.

(3) Members elected by the General Assembly for three years. The General Assembly is to elect such member or members as are necessary to ensure that the total number of the members of the Trusteeship Council is equally divided between those members of the United Nations which administer trust territories and those which do not.

Each member of the Trusteeship Council has to designate one specially qualified person to represent it on the Council. Each member has one vote and the decision of the Trusteeship Council is by a majority of the members present and voting. The Council has its own rules of procedure and is to meet according to its rules. The Council is further authorised to avail itself of the assistance of the Economic and Social Council and of specialized agencies in regard to matters with which they are respectively concerned.

Functions.—The functions and powers of the Trusteeship Council are :—

(1) To consider reports submitted by the administering authority ;

(2) To accept petitions and examine them in consultation with the administering authority.

(3) To provide for periodic visits to the respective trust territories at times agreed upon with the administering authority, and

(4) To take these and other actions in conformity with the terms of the trusteeship agreements,

(5) To formulate questionnaire on the political, economic, social and educational advancement of the inhabitants of each trust territory.

E—THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice has succeeded the Permanent Court of International Justice and is the principal judicial organ of the United Nations. The International Court of Justice is to function in accordance with the Statute which forms an integral part of the present Charter. All the members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice. It is also provided that a State which is not a member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly on the recommendatins of the Security Council.

The Charter imposes an obligation on the members of the United Nations which are parties to any case decided by the court to comply with the decision of the Court in that case. In case of failure on the part of any party to a case perform the obligations incumbent upon it under a judgment rendered by the Court the other party has been given the right to have recourse to the Security Council which may recommend or decide upon suitable measures for the purpose of giving effect to the judgment.

The International Court of Justice has also an advisory function to perform. The General Assembly or the Security Council may ask for advice of the court on any legal question. Other organs of the United Nations and the specialized agencies may be authorised by the General assembly to seek advisory opinion of the Court on legal questions arising within their respective activities.

F—THE SECRETARIAT

Composition.—The Secretariat consists of a Secretary-General and such staff as the Organization may require. The Secretary- General who is the chief administrative officer of the Organization is to be appointed by the General Assembly on the recommendation of the Security Council. The Secretary-General acts as the chief administrative officer in all the meetings of the General Assembly, of the Security Council, of the Economic and Social Council and of the Trusteeship Council and also performs such functions as are entrusted to him by these organs. He has to make an annual report on the work of the Organization to the General Assembly. He is also authorised to bring to the attention of the Security Council any matter which in his opinion may threaten international peace and security.

The Secretary-General and the staff shall not seek or receive instructions from any Government or any other authority external to the Organization. They are responsible to the United Nations and are not permitted to act in a manner which may reflect on their position as International officials. The members of the United Nations are bound to respect their International character and cannot influence them in the discharge of their functions.

The staff is to be appointed by the Secretery-General under regulations framed by the General Assembly. Appropriate staff is assigned to the Economic and Social Council, Trusteeship Council and to other organs of the United Nations and the staff so assigned forms part of this Secretariat. The Secretary-General works through departments which are eight in number. Each of these departments are presided by an official known as Assistant Secretary-General.

These departments are :—

(1) Department of Security-Council Affairs.

(2) Department of Economic Affairs.

(3) Department of Social Affairs.

(4) Department of Trusteeship and Information from non-self-governing Territories.

(5) Department of Public Information.

(6) Legal Department.

(7) Department of Conferences and General Services.

(8) Department of Administrative and Financial Services.

Miscellaneous Provisions of the Charter.—The Charter makes the following provisions :—

(1) Every Treaty and every international agreement entered into by any Member of the United Nations after the coming into force of the Charter is required to be registered with the Secretariat and is to be published by it. If the treaty or international agreement is not registered, no party to such treaty or international agreement can invoke the treaty or international agreement before any organ of the United Nations.

(2) In the event of a conflict between the obligation of the members of the United Nations under the present Charter and their obligations under any other international agreement their obligations under the Char ter shall prevail.

(3) The Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

(4) The Organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes.

(5) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Amendment and Revision of the Charter.—The rule of unanimity for the purpose of amending the Covenant of the League has not been adopted here. Amendments to the Charter can be adopted on the vote of two-thirds of the Members of the General Assembly which may not necessarily include the votes of the Members of the Security Council Amendments to the Charter so adopted will however come into force when ratified by two-thirds of the members of the General Assembly including all the permanent members of the Security Council. The amendments so made shall be binding on all the members of the United Nations. The right of veto, it would appear, vests in the permanent members of the Security Council only.

The Charter can be reviewed and revised by a general conference of the members of the United Nations. This general conference may be called by General Assembly on the vote of two-thirds of its members and by a vote of any seven members of the Security Council. Alterations in the Charter will be adopted on the vote of two thirds of the members of the conference. The alterations so adopted are required to be ratified by two-thirds of the members of the United Nations including all the permanent members of the Security Council.

If such a conference has not been held before the tenth annual session of the General Assembly a proposal to call such a conference shall be placed on the agenda of that session of the General Assembly and the conference shall be held if so

decided by a majority vote of the members of the General Assembly and by vote of any seven members of the Security Council.

VETO RIGHT

The Veto of Great Powers —The permanent members of the Security Council, the so called "Big Five" enjoy a special position in the United Nations. The provisions of Article 27 of the Charter lays down that the decision of the Security Council on all but procedural matters would be made by an affirmative vote of seven members including the concurring votes of the permanent members. This means that a pormanent member by a negative vote on any question not involving a matter of procedure can defeat the main purpose of the Council. The result seems to be that the "Big Five" are in a position to dominate over other States and are themselves above the law. The position that emerges out from Article 27 of the Charter involves a conflict with the cherished principle of 'sovereign equality' and has the tendency of destroying much of the good-will that forms the basis of the United Nations Organization. It has been well observed :—

The Charter "much as it speaks of the sovereign equality of States, violates that principle to a degree unknown in all previous annals of International Law.........It, in fact, places the five great Powers above the law laid down for the others."[1] The adoption of the 'Yalta voting formula' in Article 27 of the Charter has done little to affect the dominating position of the Big Five. The Soviet Russia exercised its veto on the question of admission of a number of States to the membership of the United Nations. Austria, Ceylon, Finland, Ireland, Italy, Nepal, Portugal and Transjordan failed to get admission because of the veto exercised by Soviet Russia. Some other States also failed to secure the favourable vote of the Security Council on account of the veto exercised by the United States and the United Kingdom. *Prof. Brierly* observed:—

> "The veto is the price that the United Nations has paid in order to obtain an organ which should have power to decide and act in a corporate capacity and it is already clear that the price has been a higher one."

It was thus obvious that the veto power residing in the Big Five was being abused. Being dissatisfied with the action of

1. W. E. Rappard—"The United Nations as viewed from Geneva" Am. Pol. Science Review. vol. XL (1946) p. 545.

the Security Council, the General Assembly discussed the matter in 1947, and asked the Security Council to reconsider the applications for admission to membership. The General Assembly requested the permanent members of the Council to arrive at an understanding among themselves for the purpose of enabling the Council to function promptly and effectively. On April 14, 1949 the General Assembly drew up a list of 35 matters which could be regarded as procedural and not subject to the veto of the permanent members and recommended that the permanent members should agree to matters on which they might exercise their veto when seven votes had already been cast. The General Assembly at the request of Argentina also referred to the International Court of Justice the question whether a State could be admitted to membership by the Assembly alone in case the Security Council failed to make the recommendation. The Court on March 3, 1950 gave its opinion that the General Assembly could not admit a new member by its own decision without the recommendation of the Security Council.

The question of veto led to the formation of a Standing Committee of the General Assembly. The Committee was named as Interim Committee and was set up in 1948 to consider and report to the General Assembly on questions referred to it by the General Assembly and to consider and report to the Assembly on any dispute or situation proposed for the agenda of the General Assembly by a member of the Security Council about pacific settlement. This Committee was entrusted with the task of studying the veto question. It gave its report which was discussed by the General Assembly in 1949. It was reported by the Committee that the veto power should be restricted so that the Security Council may freely discharge its function under the Charter without being hampered by the permanent members.

The right of veto was exercised nearly fifty times during the first five years of the United Nations with the result that the Security Council failed in exercising its primary responsibility for the maintenance of international peace. It was this situation that prompted the United States to submit an item entitled "United Action for Peace" for inclusion in the agenda of the fifth session of the General Assembly. This step was taken to enable the General Assembly to act in connection with breaches of peace or acts of aggression in the event of the Security Council failing to exercise its primary responsibility. The General Assembly on November 3, 1950 adopted three

resolutions under the heading "*Uniting for Peace.*" The most important provision of these resolutions is that the General Assembly, in case the Security Council fails because of lack of unanimity of the permanent members to exercise its primary responsibility for the maintenance of international peace, is bound to consider the matter immediately with a view to make recommendations to the members for collective measures necessary to maintain or restore international peace and security. This provision aims at nullifying the effect of the veto of the permanent members

It is obvious that the right of veto residing in the Great Powers makes it impossible for the Security Council to function in respect of its primary responsibility of maintenance of international peace in case one of the Great Powers evades its obligations under the Charter and acts in a manner likely to disturb the peace of the world. It is maintained in some quarters that the system of Collective Security embodied in the Charter has no practical effect against a Great Power and that the Charter fails in its purpose to that extent. Although in view of the declaration that the peoples of the United Nations were determined to unite their strength to maintain international peace and security it was expected that the Great as well as Small powers would cooperate in removing all threats to international peace and the Great Powers would not use their veto in their self-interest, the system of Collective Security is liable to be set at naught by the opposition of a single Great Power. Why such a provision granting the right of veto to a chosen few finds place in the Charter of the United Nations is a question which is difficult to answer. A clue to the answer of such a question may be furnished by the extraordinary events of the Second World War and the peculiar situation which prompted the Great Powers to create the Organisation of the United Nations.

The justification for the right of veto of the Great Powers may be found in the fact that the danger to international peace and security has its source in the Great powers and the Charter places very great responsibilities on them. It cannot be doubted that the Great Powers have to play a great part in the maintenance of peace undertaken by the United Nations and it need not surprise any one if they have been provided with a weapon which they without becoming aggressive may use to keep the small States in their own plaçes. The legitimate exercise of the right of veto can hurt no body and there should be no misgivings on that account. But the future appears to be dismal and gloomy if the Great Powers

by reason of disagreement among its members failed to make recommendations to the Council. At its second session the Assembly referred the question of voting in the Security Council to the Interim Committee for study and report. The report of the Interim Committee came up for consideration before the Assembly at its third session. The Assembly adopted on April 14, 1949 a resolution based upon the report of the Interim Committee recommending that the members of the Council should consider 35 specified types of decisions as procedural and that they should agree among themselves upon matters in which they might forbear to exercise their veto. All these efforts to regularize the exercise of veto met with no success for the President of the Council on October 18, 1949 stated that the permanent members failed to reach an agreement on the question.

The use of double veto was made by Russia when the Czechoslovakian question was brought before the Security Council in 1948. The Security Council was requested by *Jan Papanek*, permanent representative of Czechoslovakia to investigate into the events preceding and succeeding the change of government in Czechoslovakia on February 22, 1948. *Dr. Papanek* maintained that his country's independence had been violated by threat of force by Russia and that the *coup* was arranged with the help of Russia. The Russian representative donounced the allegations as false The proposal for the appointment of a Sub-Committee to investigate into the Czechoslovakian situation was lost on the veto of Russia. The matter could not be considered as procedural because of the Russian 'No' vote.

The President of the Security Council is entitled to pronounce a certain matter as one of procedure under Rule 30 of the Council's Provisional Rules of Procedure. This rule has the effect of excluding the exercise of the right of double veto. The President's ruling under Rule 30 can only be nullified by seven votes of dissent. The President exercised his powers in the famous Formosan case of 1950. Ecuador moved a resolution inviting the representative of the People's Government of China to attend the meeting of the Council on the Formosan question. The President on a vote of seven members against the dissenting votes of three members including Nationalist China and the United States of America declared the Ecuador motion to be adopted. The Chinese representative protested against the adoption of the resolution on the ground that it had vetoed it. At the next meeting the President put the question as to whether the matter was

procedural to vote. China exercised its veto but the President acting under Rule 30 declared the question to be procedural. The Ecuador resolusion was thus adopted inspite of the double veto exercised by China. It would thus appear that Rule 30 of the Council's Provisional Rules of Procedure provides a check on the abuse of the double veto inherent in the Great Powers.

The veto serves a purpose which was in view of the framers of the Charter and no amount of abuse of this right of veto is enough to justify the abolition of the veto. Adalai E. Stevenson speaking on this subject on November 14, 1946 observed :

"The veto itself is not the basic cause of our difficulties. It is only a reflection of the unfortunate and deep-seated differences with the Russians. If we were to escape from the atmosphere of crisis that srrounds our international relations, we must settle these differences. Merely changing the voting formula will never be enough.........The unanimity rule grew out of facts of international political life.........If the Big Five disagree on a matter involving their interests, the application of force against any of them.......... ...will produce as major war. This is the very thing the U. N. was created to prevent.........The unanimity rule is the price we have to pay for any effective organization. But the existence of the rule does not put any member of the U. N. large or small, above the law, as some people say. All the members are bound equally by the provisions of the Charter ....We condemn the attempt to use the veto to circumvent the provisions of the Charter, but to argue from this premise that the rule should threfore be abolished would be, as the French say, 'to throw out the baby with the bath."

International Criminal Court.—The General Assembly in 1948 adopted a resolution whereby the International Law Commission was asked to study 'the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international Conventions.' The International Law Commission made a report that the establishment of an International Criminal Court was both desirable and possible. The Assembly at its fifth session in 1950 appointed a Special Committee for the preparation of a draft convention and proposals relating to the establishment of an International Criminal Court. This Committee met at Geneva in August 1951 and prepared a

draft statute for such a court known as Geneva draft. The Committee proposed that the International Criminal Court be set up by a convention under the auspices of the United Nations in a conference called by the General Assembly. It made various recommendations with regard to the jurisdiction of the court and other matters connected with it. It was proposed by the Committee that the Court should have jurisdiction to decide cases of crimes under the International Law as mignt be provided in conventions or special agreements among States parties to the statute. The draft also made a proposal that such a Court was to apply International Law including International Criminal Law and where appropriate, National Law and the court was not to deal with crimes under National Law.

The report of the Committee together with the draft statute was sent to Governments for consideration. The above draft was revised by the Committee in 1953 and the revised draft was completed in August 1953 session of the Committee which sat at United Nations Headquaters. This revised draft lays down that the International Criminal Court will have jurisdiction to try individuals 'whether they are constitutionally responsible rulers, public officials or private individuals' accused of crimes generally recognised by International Law. The draft does not specify the nature of the crimes triable by the court but leaves them for specification to International Conventions to be arrived at by States. The Court under the draft is to be composed of fifteen elected Judges It has also been proposed that the Court should come into existence on the ratification of the convention by a given number of States.

The plan for the establishment of the court is yet to be finalised by the General Assembly.

The Work of the United Nations.—An account of the important international problems which have so far engaged the attention of the United Nations will show how far this orgnization has been successful in achieving the object for which it stands It is too early to form an opinion about its work on the whole but it may be safely stated that it has within the frame-work of its constitution worked admirably well. There is however some dissatisfaction in certain quarters about the work of the United Nations. It is maintaind by a section of the world that this orgnization is 'powerless as at present constituted to stop the drift of war'and that a World Federal Government with a World Legislative Assembly should be substituted

in place of the United Nations. "The only viable alternative to this dismal prospect is the voluntary establishment of a World Federal Republic, brought into being through agreement among Governments and peoples regarding the minimum essentials of central power to common defence and the general welfare of all men and women everywhere. Progress towards this goal presupposes that those possessed of decisive influence in the major sovereign centres can and will transcend somehow the violent ways of ancient days and arrive at a redefinition of values and purposes making possible the unity of mankind. Failure in the enterprise seems likely to mean the doom of man or at least the descent of the great society into the fires of chaos and the gloom of night"[1]. It is indeed true that the establishment of World Federal Republic operating through a World Legislative Assembly and World Court would fully solve the problem of international peace and security and would undoubtedly save mankind from atomic annihilation in the Third World War. But the question is whether it is not possible to acheive the same end through the existing United Nations. A World Federal Republic is to be established by consent of all the States, the United Nations has come into being with the consent of a number of States. The Charter provides for admission of all States to the United Nations If the States which have not so far come within the fold of the United Nations, have chosen to keep aloof, it is idle to expect that consent of all the States would be forthcoming for the formation of a World Federal Republic The success of an international organization in any shape depends not so much upon its structure and constitution as on the good-will of the States responsible for its working. The good-will required to create a World Federal Republic may be usefully employed in making the United Nations a perfect success. If the United Nations has at times failed, the failure is not due to any inherent weakness but to lack of such good-will on the part of the States as is necessary for the smooth and successful working of the world organization. The States both big and small have to work in a spirit of co-operation for the common good, if the United Nations is to succeed.

Let us now see what it has done in some of important matters which came before it :

1. **Indonesian Questions.**—The question first came before the Security Council in January, 1946 on the Ukranian

1. F. L. Schuman-International Politics P. 958-959.

charge against the British and Japanese action in Indonesia. The Ukranian proposal for investigation was rejected.

In July 1947 Australia and India brought to the notice of the Security Council the fighting between the Netherlands and the Indonesian Republic The Security Council asked both Indonesia and Netherlands to cease hostilities. The parties issued cease fire orders. The Security Council offered its good-offices in settling the dispute and appointed a Good Office Committee which immediately entered into negotiations. The result of these negotiations was that a truce agreement was signed on January 17, 1948 by the Netherlands and the Indonesian Republic on board the *Renville.* The Committee later on informed the Council that there was no hope of settlement and that the political tension between the parties had increased. In December, 1948 the Netherlands denounced the truce agreement and commenced military operations against the Indonesian Republic. The Security Council asked the parties to cease hostilities and called upon the Netherlands to release the President of the Indonesian Republic and other political prisoners. The Netherlands paid no heed and the Council repeated its demand. On the report of the Good Offices Committee the Security Council on January 28, 1949 asked the parties to put a stop to all military operations and guerilla warfare and made a demand for the release of the President and other political prisoners The Council also recommended the formation of a federal, independent and sovereign United States of Indonesia not later than July 1, 1950 and converted the Good Offices Committee into a Commission of the United Nations charged with the task of implementation of the resolution of the Council. The Netherlands after releasing the political prisoners asked the Council to call a Round Table Conference at the Hague to affect the transfer of Sovereignty. The Commission was asked by the Council to make arrangements for a Round Table Conference with the consent of the parties. The Commission brought out an agreement beeween the Netherlands and Indonesian Republic to the effect that Republic Government should function at Jogkarta, that guerilla warfare should cease, that all military operations should be stopped, that all political prisoners should be unconditionally released and that a Round Table Conference should be held. Republican Government returned and all hostilities ceased.

The Round Table Conference met at Hague with the representatives of the Republican Government, of that area of Indonesia which was not subject to the Republic and the

Commission in August, 1942. The Conference drew up the Charter of the Transfer of Sovereignty which laid down that the Netherlands unconditionally and irrevocably transferred complete sovereignty over Indonesia to the Indonesian Republic and recognised the Republic as an independent sovereign State. New Guinea continued to be under the sovereignty of the Netherlands but it was provided that within a year the political status of New Guinea would be determined through negotiations between the Republic and the Netherlands The conference also provided for the establishment of the Netherlands—Indonesian Union for the purpose of promoting co-operation of the two States in matters of common interest. The recommendations of the Conference were ultimately approved by the Council as well as the General Assembly. The United Nations Commission was allowed to exist for the purpose of implementing the recommendations of the Conference.

The proposal of the Conference were accepted by the Houses of the Netherlands States-General and by all parliaments of the bodies of States which were to constitute the Indonesian Republic. The formal transfer of sovereignty over Indonesia to the Republic took place on December 17th, 1949 and the Indonsian Republic came into existence.

2. Treatment of the people of Indian origin in South Africa.—India lodged a complaint with the General Assembly on the allegations that the Union of South Africa had enacted legislature discriminating against the people of Indian origin residing in the the territories of the Union of the South Africa, that the laws particularly the Asiatic Land Tenure and Representation Act of 1946 had the effect of segregating Indians both commercially and residentially and that the Union of South Africa, had not only violated the Charter's human rights provisions but also the Cape Town Agreement of 1927 between India and South Africa. The General Assembly was asked to make recommendations to the Union of South Africa to revise its general policy as well as legislative and administrative measures affecting Asiatics in South Africa and to bring them into conformity with the principles and purposes of the Charter.

The contention of the Union of South Africa was that the legislation objected to was a matter within the domestic jurisdiction and the Assembly could not take notice of this matter, that the Cape Town Agreement of 1927 was not an instrument giving rise to treaty obligations ann that it did not violate the provisions of the Charter relating to human rights

inasmuch as the Charter did not define the human rights with the result that there was no specific obligations on the States. The Union further proposed that the International Court of Justice should be asked to render an advisory opinion on the question whether the matters camplained of were within its domestic jurisdiction.

The General Assembly rejected the proposal with regard to submission of the matter to the International Court of Justice for opinion and emphasised the fact that ill-treatment of Indians in South Africa would impair the good relations between two members of the United Nations. The General Assembly gave its opinion that there should be no discriminatory treatment of the Indians and the Cape Town Agreement was binding. The two countries were asked to settle the matter and report.

In view of the attitude taken up by the Union of South Africa no settlement was possible and the General Assembly on the request of India again took up the matter and on May 14, 1949 invited India, Pakistan and South Africa to hold a round-table conference. In preliminary talks at Cape-Town in February 1950 an agreement as to agenda of the round-table conference was reached but the conference itself could not be held as India feeling aggrieved by new discriminatory legislation declined to meet. The General Assembly on December 2, 1950 recommended the meeting of the three Governments at a round-table conference on the agreed agenda The Assembly declared that if a conference was not held before April 1, 1950 or an agreement was not reached within a reasonable time, a Commission of three members would be appointed to carry on negotiations with a view to settlement. The Union of South Africa expressed its unwillingness to meet at a conference on the ground that the resolution of the Assembly constituted an intervention in matters within its domestic jurisdiction. India was willing to go to the conference but in view of the attitude of the Union of South Africa no conference could be held.

The matter is still pending before the United Nations.

3. The Palestine, question.—As a result of the First World War the United Kingdom was assigned mandate over Palestine. Palestine occupies a peculiar position inasmuch as it is revered by the Jews, the Christians and held sacred by the Muslims.

The General Assembly in its special session in April and May 1947, on the request of the United Kingdom established United Nations Special Committee on Palestine. This Special Committee proposed a majority plan and a minority plan. The majority plan was in favour of a partition of Palestine into an Arab State, a Jewish State and Jerusalem and of linking these three into an economic union. The minority plan proposed an independent Federal State composed of an Arab State and a Jewish State with its capital at Jerusalem.

The General Assembly accepted the majority plan and proposed the termination of the British mandate and the withdrawal of British armed forces from Palestine by August 1, 1948. It was also recommended that the Arab State, the Jewish State and the international regime over Jerusalem was to come into existence after two months of the withdrawal of British armed forces. The Trusteeship Council was to prepare a detailed statute of the city of Jerusalem while a Joint Economic Board consisting of three representatives of each of the two States and three members to be appointed by the Economic and Social Council was to control the economic policy of the new States. For the purpose of implementing these recommendations the Assembly appointed the United Nations Palestine Commission.

In the meatime the situation in Palestine grew worse and the Palestine Commission drew a gloomy picture in its report to the Security Council. The permanent members were asked to make their suggestions. The United States after consulting the other permanent members and the Mandatory Power of the Jewish Agency and the Arab High Committee reported that partition was not possible under the existing circumstances. It was also proposed that Palestine be put under the trusteeship and the plan for partition be abandoned. The Trusteeship Council was then asked to study the question and make its report. The report was made but was not accepted and a United Nations Mediator for Palestine was appointed in place of the Palestine Commission. Thereafter the Security Council called for a truce in Palestine and appointed Truce Commission in April 1948. This Commission reported that the general situation in Palestine was chaotic, that normal activities were at standstill and intensity of fighting was increasing. In May 1948 the United Kingdom relinquished its Mandate over Palestine. Arab States instituted an armed action in Palestine and the Security Council issued a cease fire order. The Mediator and the Truce

Commission arranged for a truce with the consent of all the parties interested. This truce expired on July 9, 1948 and the parties refused to prolong the truce. The Security Council on the report of the Mediator took action under Chapter VII of the Charter and asked the parties to discontinue all military operations. The parties were warned that in case of failure to comply with the cease-fire order the Security Council would adopt enforcement measures. This action on the part of the Security Council had no effect for on September 17, 1948 the Madiator and the Chief of the French observers were killed and the fight continued unabated. There was fierce fighting between Israeli and Egyptian forces and the former drove back the latter. The Security Council in a succession of meetings gave cease-fire orders. The Assembly adopted in December 1948 a comprehensive resolution on Palestine by which it was proposed to appoint a Conciliation Commission for the purpose of bringing about a settlement of all the matters and to put Jerusalem under the control of the United Nations. By this time the Israeli forces had been successful in occupying a part of the territory in Palestine and the Security Council gave its approval to the application by Israel for membership to the United Nations. Later on the General Assembly also accepted the application and Israel became a member of the United Nations.

The numerous mediation efforts resulted in a general armistice agreement between Egypt and Israel, Labanon and Israel, and the Hashemite Kingdom of Jordan and Israel in 1949. The Security Council adopted a resolution on August 11, 1949, whereby it was declared that the recent armistice agreements superseded the Council's truce, and the parties were asked to negotiate the final peace settlement either directly or through the Palestine Conciliation Commission. The General Assembly also discussed the question of the refugees and the status of Jerusalem. It maintained that the city of Jerusalem should be placed under a separate International regime under the Trusteeship Council and it established the United Nations Relief and Works Agency for Palestine Refugees. This Agency devoted itself to the maintenance of the relief operations.

The present position is that there is the State of Israel which is now a member of the United Nations and there is the States Trans-Jordan which in 1950 annexed Arab Palestine, in spite of the opposition of other members of the

Arab League. The Jewish State of Israel also includes a part of Jerusalem.

4. **The Korean Problem.**.—After the Japanese surrender Korea was occupied by the United States and the Soviet Russia. The former held that area of Korea which was south of the thirty-eighth parallel while the latter held the territory north of the parallel. At a Conference the two occupying States had agreed to establish a Provisional Korean Democratic Government and with this end in view a Joint Commission was set up It was provided that this Joint Commission with the help of the Provisional Democratic Government would work out a scheme for a four power trusteeship of Korea for five years.

As negotiations between the two occupying powers failed to obtain an agreement the problem was submitted to the United Nations The Russian proposal was that the Assembly should recommend withdrawal of the troops of both the United States and Russia and the Korean people should form their own National Government It was also proposed that representatives of the Korean people may be allowed to participate in the discussion before the General Assembly. These proposals were rejected and the Assembly decided to establish a Temporary Commission for the purpose of facilitating the election of representatives of the Korean people. The Assembly recommended the formation of a National Government by the elected representatives of the Korean people in consultation with the Commission. The National Government which was to come into existence was required to take over the government from the military commands of North and South Korea and to arrange with the occupying powers for the withdrawal of their troops from Korea. Russia did not participate in the discussion before the Assembly on the question of establishment of a Temporary Commission on the grounds that representatives of Korean people were not allowed to have a say in the matter.

The Temporary Commission observed the elections in South Korea under the Command of the United States and made a report to the Assembly that these elections were held in a free atmosphere, and that the results of the ballot were a valid expression of the free-will of the electorate in these parts of Korea. The Assembly on December 12, 1948 declared that the Government of the Republic of Korea had been lawfully established. It also appointed a Commission on Korea to bring about unification in Korea and friendly

relations between North and South Korea. The Commission in July 1949, reported to the General Assembly that it was not possible to unify North and South Korea and that the attitude of Russia rendered it impossible to bring about friendly relations between the two parts of Korea.

Early in 1950 the frequent Guerilla Warfare along the thirty-eighth paraellel compelled the Commission on Korea to appoint military observers. On June 25, 1950 the Commission as well as the United States informed the Secretary General that the North Korean forces had made an attack on the territory of the Republic along the parallel and this act amounted to a breach of peace. The Assembly at once passed a cease-fire order and demanded immediate cessation of hostilities and withdrawal of troops. All the members of the United Nations were asked to refrain from assisting North Korea and to render help in the implementation of this resolution of the Assembly. Sometime after this the United States informed the United Nations that hostilities were in progress and the troops had not been withdrawn by the North Koreans.

On July 7, 1950, the joint draft resolution of the United Kingdom and France for the establishment of the United Nations Command was adopted and members were required to make available armed forces and other assistance to the Unified Command. The United Nations Command was placed under General Douglas MacArthur. The North Korean Command conveniently disregarded these measures and continued fighting In the meantime China intervened in the Korean war on the ground that the invasion and occupation of Taiwan by the forces of the United States constituted an aggression against Chinese territory. The Security Council invited, the People's Republic of China which submitted a draft resolution complaining of the aggression against it and demanding withdrawal of the United States forces from Taiwan. Russia submitted its draft. Both of these drafts were rejected.

The fighting however continued inspite of the various cease-fire orders under various recommendations of the Assembly. A number of questions by all the parties to the Korean War were raised from time to time before the Assembly and the Security Council but the situation in Korea defied all efforts of settlement. At last a truce agreement was signed on July 27, 1953 and the long drawn out war in

Korea ended. The General Assembly is now arranging for a Peace Conference for settlement of the various issues.

5. **The Kashmir Question.**—The State of Kashmir which lies on the North-Western border of India was, before India attained independence, under the British rule. After the passing of the Indian Independence Act of 1947 Kashmir like other Native States had the option of acceding either to India or to Pakistan. The Government of Kashmir entered into a standstill agreement with Pakistan for the purpose of maintaining the same relations as existed between Kashmir and the undivided India. Under that agreement Pakistan was to provide facilities for transport of food and other consumer goods and petrol to Kashmir and to allow Post, Telegraphic and Telephonic Communications with the outside world through Pakistan. This agreement proved inadequate to establish good relations between Kashmir and the Pakistan, for soon after the execution of the agreement Kashmir found that Pakistan had withheld supplies of food and other commodities and was not allowing proper transport facilities to Kashmir. While Kashmir made a grievance of the breach of the agreement on the part of Pakistan, the Government of Pakistan accused Kashmir for its failure to accord proper treatment to the Muslims of Kashmir.

Then began invasions on Kashmir territory by frontier tribesmen and Western Punjab Muslims Kashmir asked the Pakistan Government to take steps to prevent the raiders from invading it through Pakistan territory but with no result. These invasions, as time passed on, became more serious and when the Kashmir Government found itself powerless to cope with the situation it appealed to India for military help. On October 26, 1947 Kashmir agreed to accede to India on a clear understanding that the final accession of Kashmir will depend on the result of free plebiscite of the people of Kashmir on restoration of normal conditions in the State. A popular Government under the leadership of Sheikh Abdullah also came into existence. India immediately sent military aid to Kashmir and military operations to stop raids on Kashmir territory came into full swing. The raiders continued their operations with their bases on the Pakistan territory and India reported to the Security Council about the extensive fighting that was going on in Kashmir. India complained that Pakistan was assisting and participating in the invasion and was guilty of aggression. Pakistan, on the other hand, contended that the accession of Kashmir to India was illegal and that it had done all that was possible to prevent the raids of the

tribesmen. Pakistan also complained that Indian forces had occupied some States of Kathiawar which had acceded to Pakistan and that India was guilty of carrying on an extensive campaign of genocide against Muslims in certain areas of India. The Security Council without any delay appointed a Commission for Investigation and Mediation. On April 28, 1948 the Security Council adopted a resolution declaring that the Kashmir situation was likely to endanger international peace and security and asked the Commission "to proceed at once to the Indian sub-continent and there place its good-offices and mediation at the disposal of the Government of India and Pakistan."

The Commission arrived in India in July 1948 and asked India and Pakistan to issue immediate cease-fire orders and to withdraw their troops. The Commission made a number of other proposals. India accepted the proposals but the Pakistan Government made a number of objections. Thereafter the Commission proposed to the Governments that the accession of Kashmir may be decided by a free and impartial plebiscite ; that the Plebiscite Administrator may be appointed by the Secretary-General in consultation with the Commission, that the result of the plebiscite would be communicated to the Security Council. Both the Governments accepted these proposals and cease-fire orders were issued by them on January 1, 1948 Fleet Admiral Chester W. Nimitz was nominated Plebiscite Administrator. The Commission, thereafter, forwarded certain proposals to the two Governments for the implementation of the truce agreement but as the two countries differed on many a point a proposal for reference to arbitration was made. This was not acceptable to India and the Commission finding mediation useless reported the matter to the Security Council.

In March, 1950 the Security Council recommended to India and Pakistan demilitarization and withdrawal of regular forces not required for security reasons and called upon them to demilitarize within five months. A United Nations Representative Sir Owen Dixon was appointed to assist the two Governments in carrying out the recommendations Sir Owen Dixon in September, 1950 made a report to the Council that no agreement between the two Governments on principles of demilitarization and the procedure of plebiscite had been reached and asked that he be relieved of his position. The Council appointed another Representative, Dr. Frank P. Graham for the purpose of effecting demilitarization as already recommended and it also asked the parties to find their way to

reach an agreement. The two Governments were further asked to refer the matter to arbitration in case they failed to reach an agreement. Dr. Graham in his report which he submitted to the Council analysed the differences between the two countries. According to him India maintained that she was in legal possession of Kashmir by virtue of the Instrument of Accession of 1947, that the assistance rendered by Pakistan to the tribesmen constituted an act of aggression, that India is in control of the defence, communication and external affairs of Kashmir in its own right, and that the Azad forces must be disbanded as they were in revolt against the established Government. The case of Pakistan as appeared to him was that the accession to India was, in view of the Kashmir-Pakistan standstill agreement of 1947 illegal, the Azad Kashmir Party and the tribal incursions were due to misrule, that India had no right to assist Kashmir or to have control of the defence of the State and that the Azad forces were not to be disbanded unless the Indian forces were reduced. Dr Graham asked the Council to call upon the two governments to take measures to improve their mutual relations.

These efforts resulted in cessation of war that was going on in Kashmir. But no agreement could be reached as to the final position of Kashmir. Sheikh Abdullah was dismissed from office and a new Government was formed in August, 1953 The Prime Ministers of India and Pakistan meeting at Delhi early in September, 1953 agreed to a free plebiscite being held without further delay to decide the question of accession of Kashmir. The details of the plebiscite are being worked out by the two Governments and it is expected that the matter will be finally settled.

6 **The Anglo-Iranian Oil Question**. —Sharp differences arose between the Government of Iran and the Anglo-Iranian Oil Company on account of the passing of the Iranian Oil Nationalization Act of 1951. The United Kingdom maintained that the Iranian Oil Nationalization Act contravened the provisions of the Convention of 1933 between Iran and the United Kingdom and that under the Covenant the parties were bound to refer the dispute arising between them to arbitration. The United Kingdom made an application to the International Court of Justice giving in detail the differences arising between the two countries over the oil question. On the Court passing an interim order which was unacceptable to Iran, the Foreign Minister of Iran cabled the Secretary-

General withdrawing Iran's acceptance of Court's compulsory jurisdiction.

Thereupon the United Kingdom asked the Security Council to consider the matter and urged that the Government of Iran by flouting the interim orders passed by the International Court was causing great economic loss not only to it but to the entire free world and that a situation which is likely to involve threat to peace had arisen. Iran asserted that the oil resources were the property of the Iranians and their nationalization had been affected in exercise of a domestic jurisdiction and that the Security Council had no authority to interfere with the exercise of a domestic jurisdiction. Iran further maintained thatthe responsibility of any threat to peace lies with the United Kingdom which wanted to resort to force in order to stop Iran from managing its own affairs and that the Covenant of 1933 being a private agreement between the Government of Iran and the former company was not binding on Iran. After a few meetings the Security Council adjourned the debate until the International Court of Justice decides its own competence in the matter On July 22, 1952 the Court held that it lacked jurisdiction. The result was that the interim orders ceased to have any legal effect.

7. **The Question of Algeria.**—This was raised by Saudi Arabia which brought to the notice of the Security Council the grave situation in Algeria on Jaunary 17, 1955. Fourteen Asian and African States on July 29, 1955 requested the General Assembly for inclusion of the Algerian question in the agenda of its tenth session. The French Government opposed this request on the ground that Algerian affairs essentially fell within domestic jurisdiction and that Algeria had been an integral part of France since 1834. France argued that every Algerian whether Christian or Muslim was a French citizen and was from the age of 21 an elector and that the United Nations was not competent to intervene in the matter. The Sponsoros of the motion including the SovietRussia contended that the repressive measures taken by France in Algeria had resulted in War between the Algerian nationalists and the French Government and that the Algerian affair was not a domestic matter. It was contended that the present status of Algeria was defined by the French Government in 1870 withoutthe consent of Algeria and that in practice the Algerians did not enjoy the same rights as the Frenchmen. Many States took part in the discussion and ultimately the question was excluded from the agenda of the tenth session of the Assembly.

Fighting in Algeria continued unabated and the French troops caused enormous loss of human lives in Algeria. The Algerian's demand for independence was met with the French declaration to the effect that Algeria was part of the Metropolitan France. The French Premier, M. Mollet went to Algeria in February, 1956 to get in touch with the situation He appointed a Resident Minister as well as two Secretaries of State in place of the Governor-General. He took no steps to ease the tension.

The Algerian question came up before the General Assembly again in 1957. The French Government did not abandon its former stand and got the support of the Great Britain and the United States of America. The Asian and African States moved a resolution in the United Nations Political Committee calling upon France to respect the Algerian's rights to self-determination. This resolution was rejected but adopted resolution expressing a hope for the settlement of the question by peaceful negotiations and for the termination of all hostilities. At the twelveth session of the' Assembly the French Government made a strong protest against the attitude of the United Nations on the ground that the Algerian question was a domestic affair and that the United Nations had no jurisdiction to intervene in Algerian affairs. At last the General Assembly adopted on December 15, 1957, a resolution sponsored by fifteen States expressing the wish that a peaceful settlement in conformity with the principles of the Charter would be arrived at.

The Algerian problem yielded to no solution for a time and became a decisive factor in the political situation of France which by the middle of May, 1958 faced the prospect of a civil war. The French Government sent General Salan with full military and civil powers to Algeria to cope with the situation there. The two parties, the right and left wing parties, came to clash repeatedly at Paris and other places. The Military Government at Algeria as also the right wing party demanded the recall of General de Gaulle The events took a serious turn and the Prime Minister tendered his resignation. The result was that General de Gaulle came to head the Government with certain conditions which were accepted by the National Assembly. General de Gaulle on coming to power visited Algeria and made a declaration to the effect that all people in Algeria would be Frenchmen 'with the same rights and duties' and that they would elect in a single college their representatives for public offices. He further declared that elections would be held within three months.

The Government of General de Gaulle succeeded in preparing the French Constitution and getting it accepted by an overwhelming majority of the French people in a nationwide Referendum. The National Assembly was elected in November, 1958. The Algerians took part in the elections. General de Gaulle was elected as President of the French Republic in December, 1958.

8. The Berlin Question.—The attention of the Security Council was drawn by the United States, the United Kingdom and France on September 29, 1948 to the serious situation that was alleged to have arisen on account of the unilateral imposition by the Government of the U.S.S R. of restrictions on transport and communication between the western zone of occupation in Germany and Berlin which amounted to a violation of Article 2 of the Charter. The Security Council was informed that the action of the U S. S. R. Government was likely to disturb international peace and security The Security Council discussed the matter at several meetings. The U. S S R. Government challenged the competence of the Security council and contended that the measures taken by it were necessary in view of the currency reforms undertaken in the Western Zone and that it was not possible to separate the Berlin question from the entire problem of Germany without obscuring the whole issue. The United States contended that the Security Council had nothing to do with the entire problem of Germany but only with so much as threatened international peace and security and that the Soviet blockade of Berlin and the other measures of duress would result in disturbance of international peace. The question was placed on Council's agenda but the U. S S. R announced that it would not take part in this discussion. Several proposals for the solution of the Berlin question were suggested in the Council but they were vetoed by the Soviet Russia. A Technical Committee on Currency and Trade in Berlin was appointed by the President of the Security Council to reccommend a proper solution. This Committee was unable to work out an acceptable solution.

The four occupying powers held informal discussions on the question during the third session of the General Assembly and an agreement was reached and the various restrictions on trade, transportation and communications were removed.

9. The Greek Questions.—A number of questions were raised in respect of Greece before the United Nations.

Early in 1946 the Soviet Russia complained to the Security Council that the presence of British Troops in Greece constituted a menace to the independence of Greece. The United Kingdom contended that the British troops were present in Greece under an agreement with the Greek Government Greece denied any interference by the British. The President of the Security Council declared that in view of the announcement made by the United Kingdom and Greece no further action was needed.

In December 1946 Greece drew the attention of the Security Council to the situation in northern Greece that had arisen on account of the aid given by her neighbours to Greek guerrillas. The Security Council appointed a Committee of Investigation composed of representatives of the members of the Council. The Committee was asked to investigate into the matter relating to the border trouble and to make its proposals for the solution of the question. The Committee of Investigation made certain recommendations which were not adopted. Greece made a request for action under Chapter VII of the Charter. In the absence of an unanimity among the members the Security Council failed to take action and the question was taken off the agenda.

The General Assembly took up the matter in September 1947 and called upon Albania, Bulgaria, and Yugoslavia to cease to give aid to Greek Guerrillas. It further asked these three countries and Greece to settle the whole dispute through diplomatic negotiations. The Assembly also established a United Nations Special Committee on the Balkans (UNSCOB) to assist the four countries in coming to an agreement and to observe whether the recommendations were complied with. Poland and Bulgaria refused to be represented on the UNSCOB on the ground that the performance of the task entrusted to the Special Committee constituted a violation of the sovereignty of Albania, Bulgaria and Yugoslavia. In its report the Committee stated that although Greece cooperated with it, Albania, Bulgaria and Yugoslavia did not recognise it as a duly constituted body and did not give it any help.

In 1948 the Assembly again asked Albania, Bulgaria and Yugoslavia to stop helping the Greek guerrillas, called upon all the four States to start diplomatic negotiations for settlement of the dispute and decided to continue the UNSCOB on the same terms as before. In its session the Assembly also established a Conciliation Committee for resolving the differences. This Conciliation Committee ended its work by the

close of the session and forwarded its report to the UNSCOB To the fourth session of the Assembly the UNSCOB submitted its report wherein it was stated that Albania, Bulgaria and Yugoslavia had given aid to the Greek guerrillas in their attempt to overthrow the Greek Government and that the Greek situation was a threat to international peace. On November 18, 1949 the Assembly adopted a resolution to the effect that the aid given by Albania, Bulgaria and certain other States was contrary to the Charter and that if such aid was continued to be given, there would be a serious danger to international peace The Assembly further asked Albania, Bulgaria and other States not to give aid to Greek guerrillas and called upon the Members not to furnish help in arms to these countries. The Assembly in its fifth session decided to continue the UNSCOB which had reported that guerrillas were receiving aid from Albania, Bulgaria, Czechoslovakia, Hungary, Poland and Romania. In 1951 the Assembly discontinued the UNSCOB but endorsed its report. It provided for the establishment of a Balkan Sub-Commission by the Peace Observation Commission for the purpose of observing the situation at the Greece frontier and reporting its conclusions to the Peace Observation Commission No report was however considered necessary to be made to the Peace Observation Commission, as the situation improved.

The question of repatriation of thousands of Greek children arising from the report of the UNSCOB came up before the Assembly. The UNSCOB had reported that about 25000 Greek children were detained in the territories of northern neighbours of Greece. The Assembly in November 1948 asked these countries to return the Greek children who wanted to come to Greece or whose parents wanted their return The International Committee of the Red Cross and the League of Red Cross Societies were asked to help in the return of the Greek children. When no children were returned the Assembly set up a Standing Committee. In 1952 Session the Assembly resolved to continue its efforts for the return of the Greek children. It succeeded in getting repatriation of Greek children from Yugoslavia. Later on the Standing Committee was discontinued. The repatriation of children from Yugoslavia did not however cease. The Red Cross was asked to continue its efforts. In spite of all these efforts the repatriation of all the Greek children has not yet taken place.

10. Representation of China on the United Nations.—The question of representation was raised by the Peoples' Re-

public of China on November 18, 1949 when the President of the General Assembly and the Secretary-General were informed that the People's Republic of China repudiated the legal status of the delegation headed by T.F. Tsiang and asserted that such a delegation had no right to speak for China in the United Nations. The People's Republic of China demanded the expulsion of the delegation from the United Nations. The Soviet Russia supported the People's Republic of China and proposed the exclusion of the delegation. A meeting of the Security Council was called. The Soviet Russia declared that its representative will not attend the Council until the delegation under Dr. Tsiang had been removed The question of representation was again raised on August 1, 1950 when at a meeting of the Council the President ruled that Dr. Tsiang did not represent China and was not competent to take part in the meetings of the Council. The Council overruled the President's ruling.

In August 1950 the Secretary-General was informed that a delegation of the People's Republic of China would attend the fifth session of the General Assembly. The question of representation of China was referred to a Special Committee which on October 16, 1951 reported that it was unable to make any recommendations to the Assembly on the matter. This question was raised in succeeding sessions but no decision was taken The Soviet Russia at the tenth session of the Assembly again submitted a draft resolution providing for the seating of the representatives of the People's Republic of China. The consideration of the matter was again postponed

The question of the representation of China involves a number of complications. The proposal of the Soviet Russia for a seat to the representative of the People's Republic of China in the Council is supported by Rule 17 of the Security Council's Rules of Procedure which allows a seat in the Council to a representative whose credentials are objected to until the decision by the Council. It is thus obvious that the question of the representation of China is to be decided by the Security Council and that the representative whose credentials are objected to will be entitled to take part in the proceedings of the Council until such decision. It is also clear that the representative of the Nationalist Government of China cannot be excluded from the Council so long as the Council has not decided the question. Now, the result will be that the representative of the Nationalist Government of China if allowed a seat in the Council, will

be entitled to exercise the right of veto. Similarly, the representative of the People's Republic of China, if allowed a seat in the Council will exercise the same right of veto. If both of these representatives are allowed seats, the veto will be exercised by one against the other. There is nothing in the Rules of Procedure of the Council which may meet such a situation.

The other difficulty lies in the choice of the standards by which a particular Government be judged to represent the country. The General International Law requires that a Government which has stable effective control over all or nearly all the National Territory and which commands obedience of the bulk of the population is alone entitled to recognition and therefore to represent the country. The Secretary-General of the United Nations recommended the adoption of the principle laid down in Art. 4 of the Charter which requires that a member should be able and willing to shoulder the obl gations of the Charter and advised the recognition of that Government which can effectively discharge the obligations of the Charter.

These and other complications have prevented a satisfactory solution of the problem.

CHAPTER XXXI

COLLECTIVE SECURITY AND CO-EXISTENCE

The growth of the concept of Collective Security.—The idea of maintaining international peace through collective rather than individual effort is not a new one but it was born with the earliest attempt to save mankind from the divastation and horrors of the war. Even before any system of international law began to take shape the States had realized that if they combined to wage a joint war against one of them which was bent upon breaking international peace, the defeat of the peace-breaker resulting in the maintenance of international peace would be fully assured. The system of collective security is an extension of the principle of unity to the affairs of international order This idea permeated the early efforts of mankind to form into groups or classes and could not be excluded by States in their relations with other States. It cannot

be said that the idea of collective security in some form was not known to the earliest City-States of the Tigris-Euphrates Valley and the Nile Valley. The treaty of 1280 B.C. between King Hattashilish III of Hittites and Rameses II of Egypt embodied obligations of collective security for outlawing war. It will be instructive to note some of the terms of this treaty which may be stated thus :

" There shall be no hostilities between them for ever. The great Chief of the Hittites shall not pass over into the land of Egypt for ever, to take anything therefrom ; Rameses the great Chief of Egypt, shall not pass over into the land of the Hittites to take anything thererfom, for ever .... If another people (or State) shall come, as an enemy, against the lands of Rameses, the great Chief of Egypt and he shall send to the great Chief of the Hittites saying "Come with me with your army against him". The great Chief of the Hittites shall come and the great King of Hittites shall slay his enemy. But if it shall not be the desire of the great Chief of the Hittites to come, he shall send his infantry and chariotry, and shall slay his enemy. Or, if Rameses, the great Chief of Egypt, be provoked against delinquent subjects when they have committed some other fault against him, and he shall come to slay them, then the great Chief of the Hittites shall act with the lord of Egypt."

The idea of cooperation among nations inspired political thinkers in their ambitions schemes. *Dantes* laid down the ambitious scheme of world organization and emphasized on unity of nations. His contemporary *Pierre Dubois* in his celebrated work entitled '*De recuperative sanctae terrae*' recommended union of nations and a collective action for the rescue of the Holy Land from the infidel. The 'Grand Design' of Henry IV formulated the principle of cooperative effort on the part of nations in the interest of international peace. *William Penn* in his Essay toward the Present and Future Peace of Europe (1693) visualized a complete union of States with an elaborate system of preservation of international peace. *Abbe Saint Pierre* at the Conference of Utrecht brought forward his famous Project of Perpetual Peace and proposed an alliance among States and measures of collective security for the maintenance of peace. *Rousseau* thinking similarly proposed a confederation of nations having power to enforce its will on the law-breaking nation. *Jeremy Benthem* taking a clue from Rousseau proposed defencive alliances, disarmament, abolition of tariff barriers, bounties and abandonment of colonialism. He recommended

that the establishment of tribunal of peace having power to coerce a refractory State to a peaceful conduct *Immanuel Kant* in his essay *Zum Ewigen Frieden* (Towards Eternal Peace) proposed an international federation and recommended that all States should have republican constitution, that there should be world citizenship, that States should agree to disarmament and that they should follow the principle of non-intervention. His thesis was :

> "Every State, even the smallest, may thus rely for its safety and its rights, not on its own power, nor on its own judgment of right but only on this *foedus amphictimum* on the combined power of this league of States and on the decision of the common will according to law."

Vattel held the view that 'all nations may put down by force the open violation of the laws of the society which nature has established among them or any direct attacks upon its welfare.'

These and many other Utopian plans influenced the States to form alliances to ensure international peace. The nineteenth century wars were followed by ambitious schemes to prevent recurrence of wars. Though these schemes did not succeed in their objects, they exhibit an anxiety on the part of big powers to control disorder among nations. The Holy Alliance of 1815 was based on an agreement whereby Russia, Austria and Prussia pledged themselves "to take for their sole guide the precepts of that holy religion, namely the precepts of justice, Christian charity and peace and to re,main united by the bonds of a true and indissoluble fraternity." This Alliance worked well till 1820 when intervention in revolts in Naples, Piedmont and other States was proposed. Austria was allowed to make an armed intervention in the revolts at Naples and Piedmont in 1821. France intervened to restore Ferdinand VII to his absolute power in Spain in 1823. The Alliance was crushed to pieces as the parties to it claimed a general right of intervention in the internal affairs of independent States and acted in violation of the principles of international solidarity which they aimed at safeguarding. The famous Concert of Europe after the disappearance of the Holy Alliance was established to bring about cooperation among nations. It was not an international organization but represented a system of constant consultation among the big nations of Europe. "The Concert of Europe emerged out of the efforts of the Powers to deal with the 'Eastern Question.'

The powers likewise acted in concert in the recognization and neutralization of Belgium and in the partition of Africa and Asia among the great Imperial States. But conflicting interests led to discord. In crisis, when its services were most needed, it was non-existent ; for it had no permanent organs or procedures, and each State determined for itself in each situation whether it would cocperate or not."[1]

The beginning of the twentieth century saw the international atmosphere surcharged with ideas of international co-operation. It was realized by politicians and statesmen that it was necessary for the big powers to form a league and combine for the establishment of enduring international peace. The First World War strengthened this realization and America took the lead in advocating an organization of nations based on co-operative spirit for the prevention of disturbance to international peace. During the war itself American statesmen established a 'League to Enforce Peace' to mobilise public opinion in favour of combination of States for ensuring everlasting peace. In 1917 President Wilson of America declared :

> "In every discussion of the peace that must end this war it is taken for granted that peace must be followed by some definite concert of power, which will make it virtually impossible that any such catastrophe should ever overwhelm us again." After America had plunged into war, the President again advocated a combination of States which he characterized as 'a league of honour, a partnership of opinion."

The end of the First World War marked the establishment of the League of Nations with its system of collective security which failed to achieve the desired object. The destruction of the League and the termination of the Second World War was followed by the birth of the United Nations Organisation. The system of collective security envisaged by the Charter offers a guarantee for international peace and security.

System of Collective Security under the League and its failure.—The Govenant of the League envisaged a co-operation of all the States of the world not only for the purpose of maintaining international peace and security but for promoting international common interests. The League was designed to serve as an agency for the prevention of war and pacific settlement of disputes.

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1. Schuman : International Politics p. 207.

The Signatories to the Covenant agreed 'to promote international co-operation, and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of International Law as the actual rule of conduct among Governments and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another.' The Covenent prescribed an ideal course of action based upon cooperation and its various articles laid down the method of prevention of war. Article 10 of the Covenant contained a guarantee against external aggression and for preservation of the territorial integrity and existing political independence of all the Members of the League. Articles 12, 13 and 15 provided for peaceful settlement of international disputes and laid down the methods of approach for such settlement. Article 16 provided that a war resorted to by any State in violation of articles 12, 13 or 15 was to be regarded as a war against all other Member States and the Member-States other than the State making war were bound to sever all trade or financial relations with the Covenant-breaking State and to prevent all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State whether member of the League or not. The Council of the League was under an obligation to ask for contribution in effective military, naval or air force from the various Governments and the member-States other than the Covenant-breaking State and undertook to cooperate in various steps for putting an end to the lawless war. The system of collective security established by the Covenant was intended to replace the old system of individual defence and there were laid foundations of a systematic programme of collective security. There is no doubt that the system of cooperative defence envisaged by the Covenant was fully adequate for bringing about permanent international peace but unfortunately it failed to achieve the desired result. The failure was not due to any defect in the system but was due to the incapability of the States to take advantage of the system. The Covenant of the League though brought into existence in a spirit of cooperation proved ineffective to inspire confidence in the Member-States about the strength of the League and to bring the member-States closer in cooperation. In other words, the member-States lacked in mutual confidence and were in reality suspicious of one another and did not regard the League so potent as to meet a tense international situation. The lack of mutual confidence did not allow the States to rise

above their national interests and rendered the disarmament plan of the League abortive. The Member-States failed to act up to their pledges and the various sanctions of the Covenant remained ineffective. The understandings expressed in the Covenant proved to be mere pious wishes and did not bring about change of hearts. The States did not really believe in cooperative efforts and mainly depended upon their individual capacity to defend themselves. The big powers did not permit the plan of disarmament to succeed as they did not in fact, choose to reduce their military resources. *Schuman* observes, "The League remained a method of cooperation among Sovereign Governments. Their subjects and citizens remained patriots devoted to national interests. In some States, they were bewitched by visions of tribal conquest; in others, frightened into passivity; in still others, befuddled and betrayed. No where were they united in the effective service of common purposes. The League's white palace in Ariana Park, by the shores of Geneva's Lake Leman, therefore became, in the end, a Sepulcher."[1]

The League was dominated by the Great Powers and was therefore never strong enough to deal effectively with problems involving them. It could however, deal with small States to the advantage of the Great Powers. The unfortunate events of 1931 found the League paralysed. The Japanese aggression could not be checked and the resolutions of the Council and the Assembly were contemptuously ignored. The system of collective security envisaged by the Covenant failed to work as intended and the whole world which felt secure under the League found itself disillusioned. The impotency of the League was fully exposed and the Covenant was left with no sanctity. The break down of the Disarmament Conference and the subsequent plans of rearmament gave rude awakening to a world dreaming of permanent peace. The crash came with the Italian attack against Ethiopia in 1935. The Ethiopean cry for help met with no good response, the Council only made in vain an appeal to Italy for peaceful settlement. Ethiopia then found itself abandoned and forlorn and *Haile Selassie* before flying for life showered curses on the League and its Covenant. Neither the Council nor the Assembly was inclined to displease Italy and both of them preferred to abandon that principle of cooperative defence which they had undertaken to uphold and maintain. The system of collective security failed to restore peace in the international order and the downfall of the

1. Schuman: International Politics p. 217.

League became fully assured. The Second World War came soon after and the League was burried under the wreckage of the war-torn world.

Collective Security under the United Nations.—The termination of the Second World War marked the establishment of the United Nations Organization The Charter of this Organization is a magnificient document which is impressive and elaborate. The Security Council is primarily responsible for the maintenance of international peace and security. The theory of 'Collective Security' has been accepted by the Charter and the intention is to exercise cooperative coercion over war-minded State. The unanimity of the Great Powers has been prescribed for the purpose of making the system of Collective Security a success. The Charter makes it necessary that all the five permanent members of the Council must agree before coercive action under the system of Collective Security is taken. Chapter VII of the Charter deals with measures of Collective Security in cases of breaches of the peace. The Security Council has taken upon itself to determine the existence of any threat to peace, breach of peace and acts of aggression and to decide upon the course of action in such matters. It is competent to adopt provisional measures before making recommendations as regards the steps to be taken for the prevention of breach of peace. Article 41 of the Charter enables the Security Council to decide upon the measures involving the use of armed force in a particular situation and to call upon the Members of the United Nations to apply such measures. The Security Council is permitted to take such action by air, sea or land forces as may be necessary to maintain or restore international peace in case it thinks that the steps taken under Article 41 are inadequate. All the Members of the United Nations are under an obligation to make available to the Security Council on its call or in pursuance of some special agreement, armed forces, assistance and facilities including rights of passage, necessary for the maintenance of international peace. The Members are also obliged, in cases where the United Nations takes urgent military measures, to immediately make available national air force contingents for combined international enforcement action. The Military Staff Committee of the United Nations is to assist and advise the Security Council on all questions relating to Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, and the regulation of armament and disarmament.

A careful reading of Chapter VII will show that the system of collective security envisaged by the Charter is stronger than that of the League of Nations. The provisions of the Charter place greater restriction on individual self-defence; ensure prompter action in cases of emergency and make available more effective measures for the prevention of international breach of peace. It is indeed true that the system is admissible but the causes which brought the destruction of the League have not, unfortunately been removed. Lack of mutual understanding and mutual trust among the nations is as apparent today as it was during the League regime. The United Nations, there is no doubt, has its foundations in the unity of the Great Powers. The Great Powers are seldom unanimous with the result that the United Nations has not been able to deal with disputes which involved the balance of power in the world. The veto vested in the five permanent members of the Security Council is capable of renderring the system of collective security quite ineffective in any situation. It cannot be denied that the rule of unanimity was adopted by the Charter under the stress of the international conditions. The unanimity rule could not be discarded, for the United Nations was intended to be an effective organization. But experience gained from a number of international events shows that application of the rule of unanimity has at times rendered the United Nations wholly ineffective. The unanimity rule can only thrive in an atmosphere of mutual trust and understanding. The big powers which are required to be unanimous lack in mutual trust and do not act in a spirit of cooperation. They distrust each other and therefore are anxious to maintain a political balance of power The absence of unanimity is due lo ideological differences among the great powers.

The Korean War put the United Nations system of Collective Security to a severe test. The events of that war and the detailed account of the measures taken by the Council and the Assembly show that the system of Collective Security did not work effectively. "Some contended that these events demonstrated the inworkability of Collective Security through the U. N. When Trygve Lie, on July 14, 1950, appealed to 50 States to send combat troops to Korea, 35 declined or failed to reply. When the Collective Measures Committee, on April 11, 1951, asked all members to earmark troops for U. N. Service and to reply "as a matter of urgency," the U. S. A. delayed a reply until June 8 and then declined to do what was asked, as did all other members. The war

was U. N. war in name only."[1] But inspite of all that happend in this and other situations there is no reason to think that the United Nations and its system of collective security are of no utility. The achievements of the United Nations in various fields cannot be ignored and it can be safely hoped that with the promotion of common interests of the nations which is easily realizable under the influence of the United Nations the big powers would rise above national interests and would in the course of time imbibe spirit of cooperation and foster feelings of trust and confidence towards each other. If this hope is realized the United Nations would certainly fulfil the functions which its founder had in view.

Present day problem of Co-existence and Collective Security.—The principle of co-existence is not incompatible with the basic principle of collective security. 'Live and let live' is an old adage which explains the principle of peaceful co-existence The principle of co-existence is one of the five principles which make up the *Panchshila.* It cannot be denied that the observance of the principle of the co-existence is bound to result in perpetual peace in the international order. The principle of peaceful co-existence supported by the principle of co-operation is all that is needed to save mankind from nuclear wars. Both these principles have been adopted by the Charter of the United Nations and the nations, specially the big powers, are required to act upon these principles in order to prevent the United Nations from meeting the same fate as the League of Nations.

The system of collective security and the principle of co-existence have not yet come into full operation because of an apparent conflict between two main power blocs having different ideologies. Since the establishment of the United Nations a cold war has been going on between Communism and Capitalism, between the Soviet Russia and the big capitalist countries. This cold war has resulted in preventing the Security Council in discharging its obligations under the Charter. The Soviet Russia with its Communism cannot agree on questions of international politics with the United States, the United Kingdom and other capitalist countries. The Communist Soviet Russia and her satellites have no faith in the principle of co-existence for they think that States with different ideologies cannot co-exist. Lenin said : "As soon as we are strong enough to defeat capitalism as a whole, we shall

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1. **Schuman :—International Politics p. 245.**

immediately take it by the scrupt of the neck. As long as capitalism and socialism exist, we cannot live in peace ; in the end, one or the other will triumph—a general dirge will be sung over the Soviet Republic or over world capitalism." What Lenin said represents the ideology of Soviet Russia and there is no doubt that in Russian socialism the principle of co-existence has no place. The Twentieth Congress of the Communist Party held in 1956 reaffirmed its faith in Leninism and asserted that it was inevitable that all nations would adopt Socialism. It asserted that in capitalist countries there was already going on a class struggle and the discontent among the working classes was the cause of such struggle. It further declared that transition from capitalism to socialism would take place through class struggle and violent revolution. The Soviet Russia and her satellites cannot therefore accept the principle of co-existence as a practical solution of the problems relating to international peace. The socialistic ideology is thus responsible for the exercise by Soviet Russia of her veto on many a matter that came before the Security Council of the United Nations and for her refusal to accept many a proposal made by the United States and other capitalist countries.

The capitalist countries believe that communism or socialism is fundamentally wrong as a social theory. They are taking all possible steps to maintain capitalist society and to exclude socialism from the social order. The conflict between the capitalist countries and the Soviet Russia and her satellites is one arising from difference in their social ideologies. The principle of co-existence is negatived by such a conflict which is going on in international sphere. Such a conflict is evidenced by the moves and counter-moves on the international chess board and it overshadows every political and economic problems of the present day. The capitalist and the socialist countries not only distrust each other but are afraid of each other. The result is that this cold war has greatly weakened the system of collective security. The permanent membership of the Soviet Russia in an organization which stands for the principle of co-existence and which provides a machinery for the working of the system of collective security is responsible for the failure of the United Nations in situations where with its admirable machinery it should have succeeded. "If the absence of the United States was the weakness of the League of Nations, the presence of Russia is the weaknes of the United Nations, for it is plain that there is no middle ground between the aspirations of democracy and the aspirations of commuinsm

Either man lives for the State and is subordinated to it or else the State exists for man. It is a fundamental principle of Marxism that no world peace is possible as long as capitalism and western democracy exist. Who will conquer whom remains for the communists the great question of the day."[1]

CHAPTER XXXII

SECURITY PACTS AND INTERNATIONAL ENGAGEMENTS

A. MILITARY PACTS UNDER THE CHARTER

The principal object of the United Nations Organisation being the maintenance of international peace and security the Charter permits the adoption of all means that are likely to assist the organization in achieving its object. Article 52 of the Charter does not preclude the existence of regional arrangements or agencies which may be established for the purpose of maintaining international peace and security and which may not be in any way inconsistent with the purposes and the principles of the United Nations. It is also provided that the members of the United Nations entering into regional arrangements are under an obligation to make all efforts to bring about pacific settlement of local disputes through the agency of these regional arrangements before taking the dispute to the Security Council. The Security Council, on the other hand, would encourage pacific settlement through regional arrangements of disputes. The Charter contemplates that regional arrangements and international engagements if consistent with the purposes and principles of the United Nations would help the United-Nations in achieving its goal of annihilation of warfare and of maintenance of everlasting peace. It is provided in Article 54 of the Charter that the Security Council has at all times to be kept fully informed of the activities undertaken or in contemplation under regional arrangements for the maintenance of international peace and security.

It must however be borne in mind that the Charter speaks of 'regional arrangements or agencies' and not of those arrangements arrived at among States not of the same region. The

1. Communism v International Law p. 86.

question arises whether it is permissible under the Charter to have arrangements or groupings of States belonging to different regions If the word 'regional' has to be assigned a meaning the answer easily follows that arrangements of States not belonging to the same region is not countenanced by the Charter Many international arrangements that exist at the present moment do not strictly fall within the expression 'regional arrangements'. *Julius Stone* observes: "undoubtedly arrangements do exist which fall, at least in part, within both the words and the underlying occupation of the Charter. But they do not include some of the most important treaty arrangements sometimes m·ntioned in this connection. Of these, the Act of Chapultepec, the *Rio de Janeiro* Treaty, the Brussels Treaty for Wetern European Union, the North Atlantic Treaty of Mutual Defence, the Pacific Security Treaties, and the Agreement on the European Army of 27 May, 1952 few are applications, even in part, of Articles 52-54 of the Charter. Most of these are directed not to meeting common problems whose ambit is limited by the region but to defence of the region against attacks from another region. Such arrangements may be justifiable and indeed indispensable, but that does not make them "regional arrangements" within Articles 52-54 Any other view would mean that these Articles had undergone a serious *detournement*."[1]

There is a two-fold trend of international arrangements at the present time. On the one hand there have come into existence military pacts among nations and, on the other hand, common economic and social interests have led to a number of international engagements. The international situation in brief is this that while the powers which weild influence in the world politics are suspicious of each other and are trying to form into groups to strengthen Military power against any possible aggression, they find inconvenient to enter into treaties with other States for the promotion of their common interests in many a social and economic field. The brief description of some of the important pacts and engagements will bear out the trend in international sphere. The international conflict is between the Communist and the non-Communist countries. The Soviet Russia and her satellites on one side and the United States and her allies of the non-Communist group are opposed to each other in international politics and the cleavage between these two-groups is so sharp that important Military pacts have come into existence. A few international treaties for the

1. Julius Stone : Legal Controls of International Conflict p. 249.

achievement of common social and economic objectives symbolic of the other trend have also come into being.

1. North Atlantic Treaty Organization. (NATO)

The establishment of this Organization followed the Brussels Treaty of 1948. This treaty was arrived at between Belgium, France, Luxemburg, the Netherlands and the United Kingdom on 17th March, 1948 for the purpose of securing joint defence against aggression in Europe, for bringing about economic, social and cultural co-operation and for setting up of a permanent consultative machinery to carry out the object aimed at by this treaty. The attitude of the Soviet Russia towards the non-communist countries and its aversion to participate in the European recovery programme led to this treaty. This treaty led to the foundation of a 'Western Union' for the purpose of meeting the situation created by the conduct of Soviet Russia supported by its satellites in the United Nations Organization. The United States and the Canadian Governments expressed themselves in support of the Western Union and although they were not parties to the Brussels Treaty, they commenced their efforts to exercise under Article 51 of the United Nations Charter the right of individual or collective self-defence and proposed the formation of a regional international organization based upon self-help and mutual co-operation. The Berlin blockade and the communist *coup* in Czechoslovakia precipitated the establishment of the North Atlantic Organization. On 4th April, 1949 the North Atlantic Treaty was signed by Belgium, Canada, Denmark, France, Iceland, Italy, Luxemburg, Netherlands Norway, Portugal, United Kingdom and the United States. Greece and Turkey became members of this Organization in 1952 and Federal Republic of Germany joined in 1955.

The parties to the North Atlantic Treaty re-affirmed their faith in the purposes and principles of the Charter and expressed their anxiety to live in peace with all peoples and Governments. They aimed at protecting the freedom, common heritage and civilization of their people founded on principles of democracy, individual liberty and the rule of law and at promoting stability and well-being of the North Atlantic Area. They further declared their determination to unite their efforts for collective defence in the cause of international peace and security. The signatories to this treaty under-took to settle any international dispute by peaceful means and to make all efforts not to endanger international peace and security. They also agreed that an armed attack against one

or more of them in Europe or North America was to be considered an attack against them all and placed themselves under an obligation that in case of such an armed attack each of them in exercise of the right of individual or collective self-defence will assist the party or parties so attacked by taking forthwith individually and in concert with other parties such action as might be deemed necessary for the purpose of restoring the security of the North Atlantic areas. The treaty further stipulates that it does not affect in any way the rights and obligations under the Charter of the parties which are members of the United Nations Article 9 of the Treaty permits the parties to invite any other European State to join them in contributing to the security of the North Atlantic Area.

Structure of the North Atlantic Treaty Organization.—There is a Council which is a supreme body of this Organization. It consists of the representatives of the Governments which are parties to the Organization. Ministers, Ministers of foreign affairs, Ministers of defence or other Ministers of the various Governments meet two to three times a year to chalk out the policy of the Organization. The Council appoints Committees for different matters for the purpose of study and report on subjects assigned to them. The Secretary-General is appointed by the Council and he is responsible for placing appropriate matters before the Council for its decision. The Organization maintains a Military Committee which functions to advise the other NATO agencies on military matters. This Committee is represented by Chief of Staff of each member country and meets at least once a year. The agency of the military committee is known as the Standing Group which meets at Washington. The Standing Group has three members representing the Chief of Staff of France, the United Kingdom and the United States. It functions permanently and is responsible for the military policy of the Organization. The sphere of the activities of this Organization has been divided into four groups—Allied Command Europe, Allied Command Atlantic, Channel Committee and Channel Command and the Canada United States Regional Planning Group. Each Group has a separate area and all these Groups carry on their activities under the direction of the Council and the Military Committee.

2. The Anzus Pact (1951).—This is a pact between Australia, New Zealand and the United States arrived at in pursuance of Articles 51 and 52 of the Charter for the purpose of meeting any form of aggression against any of the parties to

the Pact. The three countries have pledged themselves to furnish a joint defence in case an armed attack is made on anyone of them in the Pacific. The Pact is based on principles of mutual help and cooperation. The aim is to ensure security of the territories of the three States through a system of collective security envisaged by the Pact. The parties to the Pact are under an obligation to meet armed attack in the Pacific area on any one of the parties and threats to the territorial integrity, political independence or security of any one of them in the same area.

The Pact establishes the Foreign Ministers Council to function "pending the development of a more comprehensive system of regional security in the Pacific area, and the development by the United Nations of a more effective means to maintain international peace and security." This Treaty was signed on September 1, 1951 at San Francisco.

3 **The South-East Asia Treaty Organization** (**SEATO**). The success of the Communism in Indo-China and North-Vietnam meant danger to the Western powers. It became then evident that if effective steps were not taken the Communists would overpower Asia. It was considered necessary to bring about a defence organization on the lines of the NATO to check the Communist advance in South-Eastern Asian countries and the neighbouring Pacific regions. The combined efforts of the United States and the United Kingdom resulted in the conclusion of a treaty known as the South East Asia Collective Defence Treaty which was signed on September 8, 1954. The Treaty is based on the principle of the sovereign equality of all the parties to it. It reiterates faith in the purposes and principles of the Charter and declares the desire of the parties to live in peace with all peoples and all Governments. The signatories to the Treaty undertake to earnestly strive by every peaceful means to promote self-government and to secure the independence of all countries whose peoples desire and are able to shoulder its responsibilities. They further express their anxiety to strengthen the fabric of peace and freedom and to uphold the principles of democracy, individual liberty and the rule of law and to promote the well being and development of all peoples in the Treaty. They declare their obligation to stand united against aggression in the Treaty area and to strive for international peace and security.

The Treaty contains provisions similar to those contained in the North Atlantic Treaty. The United States of America while signing the Treaty has added a note of 'understanding'

to the effect that its obligation under the Treaty to stand united is with reference to Communist aggression and that it will consult immediately as is required under Article 4 (2) in case of another type of aggression or armed attack.

The South-East Asia Treaty Organisation has been set up under the Treaty and maintains a Permanent Military Planning Staff, the Executive Secretariat, the Public Relations Office, the Cultural Relations Office, the Economic Office, and the Resource Service besides *ad hoc* Committees to deal with matters that may arise in the ordinary work of the Organisation.

4. **Warsaw Pact (W P.)**—This Pact is the Soviet reply to the North Atlantic Treaty Organisation. This was brought about at a Conference held at Moscow in December 1954 by the Soviet Russia and her satellites. The Pact was signed at Warsaw on May 14, 1955 with the object of ensuring peace and security and of achieving cooperation in economic, social and cultural spheres. The parties to this Pact re-affirmed their desire to establish a system of collective security in Europe based upon the participation of all European States, irrespective of their social and State systems and expressed their faith in the purposes and principles of the United Nations. This Treaty of friendship, co-operation, and mutual assistance was concluded in conformity with the principles of respect for the independence and the sovereignty of States and non-interference in domestic affairs.

The parties to the Treaty have agreed to set up a united command of their armed forces against foreign aggression and to take co-ordinated measures to strengthen their defence capacity in order to protect the peaceful labour of their peoples, guarantee the inviolability of their frontiere and territories and ensure defence from possible aggression. They are under an obligation, in case of armed attack in Europe on one or several States parties to the Treaty by any State or group of States to exercise the right to individual or collective self-defence in conformity with Article 51 of the Charter. They have undertaken not to join any coalition of alliance and not to conclude any agreement the aims of which run counter to the aims of the Treaty.

The Treaty provides for the establishment of a 'Political Consultative Committee' and a "United Military Command".' A Permanent Commission has also been set up to study the international situation and to make recommendations with regard to foreign policy.

5. The League of Arab States.—As a result of a Conference of the Arab States held at Alexanderia a Pact establishing the League of Arab States was signed at Cairo on March 22, 1945. Egypt, Lebanon, Syria, Transjordan, Iraq, Saudi Arabia and Yemen signed the Pact. The League of Arab States has for its objects the strengthening of the relations between the members, political collaboration, defence of the independence of Arab States, discussion of the affairs of the members, and cooperation in economic, social, cultural and financial interests.

The members of the League are under an obligation not to use force in settling their disputes. It is also provided that in case the dispute among members is not settled in a peaceful manner, it is to be referred to the Council of the League whose decision is final. The Council will also function to mediate in disputes which might lead to war between members or between a member and a non-member.

The organization has a General Council, Special Committee and a general Secretariat. There is also a Political Committee consisting of Foreign Ministers of the member States which functions under the General Council.

6 The Rio de Janeiro Pact or the Inter-American Defence Treaty of Reciprocal Assistance 1947. —The American States have aimed at a regional international arrangement as contemplated by Article 51 of the Charter by entering into this Pact. It provides for a system of collective security and stipulates for a united front against foreign aggression .The scheme of this Pact is similar to the one laid down in the North Atlantic Treaty.

7. Defence Pact between United States and Japan (1951).—The United States and Japan entered into a treaty whereby the former undertakes to aid Japan against any foreign aggression including any internal disturbance caused with the help of a foreign power. Japan, on the other hand, has agreed to restrict its independence with regard to its dealings with third powers.

8. Egypt-Syria Defence Pact (1955).—This arrangement provides for mutual help and co-operation in the event of an armed attack on any one of the parties. The Pact requires the parties to unite their military strength to meet foreign aggression. It provides for the establishment of a Supreme Council consisting of foreign and defence ministers of the two countries, and a War Council consisting of the Chiefs of Staff

of these countries. The War Council functions as a consultative body.

9. The Baghdad Pact or the MEDO (1955)—It was through the efforts of the United States that this Pact for the defence and security of the Middle East region was brought about. Although the United States is not a Signatory to the Pact, it has always given full support to the Middle East Defence Organization. This Pact was signed on November 22, 1955 by Iraq, Turkey, Iran, Pakistan and the United Kingdom. It is to last for five years but is renewable.

The Pact aims at providing mutual defence against aggression through the system of collective security. It has been designed to protect the Middle East region from the Communist aggression.

Iraq gave a fatal blow to the Pact by formally withdrawing from it in 1959. The military arrangement contemplated by the Pact has been disturbed and it can be safely said that the Pact has now broken down. The United States even before the formal withdrawal of Iraq from the Pact entered into bilateral treaties with Pakistan, Iran and Turkey. These bilateral treaties aim at the achievement of objects similar to those of the Baghdad Pact.

The United States, under the terms of these treaties has undertaken to take such action with and without the use of armed forces as may be mutually agreed upon between the parties for the purpose of meeting any aggression against the other party and of promoting peace and stability in the Middle East. The other parties have agreed to utilize such military and economic assistance as may be provided by the United States in a manner consonant with the aims and purposes set forth by the Governments associated in the declaration signed in London on July 28, 1958 and for the purpose of effecting and promoting their economic development.

10. The Balkan Pact (1954)—This is again a Pact for the purpose of increasing military strength of the parties so as to be fit for meeting foreign aggression. The Pact has been made for twenty years and is between Greece, Turkey and Yugoslavia. The parties to the Pact have undertaken to render mutual help against foreign aggression.

B. INTERNATIONAL ENGAGEMENTS

There is no doubt that cooperation among the various States of the world in matters of common interests has greatly in-

creased and although on the one hand there is a feeling of misgiving and suspicion among nations there is on the other hand a marked tendency to achieve international co-operation for the promotion of common social and economic interests. The function of International Law in regard to to promotion of common interests is in these times clearly manifested in ever increasing international engagements which aim at regulating international cooperation in many a field of common interests It is to be noted that inasmuch as there is no conflict of rights in matters of common interests, cooperative action which is bound to result in benefit to all has been possible by means of bilateral and multilateral engagements. It is an important function which International Law is at present performing for economic and social interests of States have become complex in recent years and international cooperation is essential for their promotion. The promotion of these interests is calculated to increase national welfare and cooperative action in these matters results in benefit to all. It is proposed to notice the co-operative spirit of the States in action by a brief description of important international engagements.

1. The Colombo Plan for Co-operative Economic Development in South and South-East Asia.—This Plan is a big co-operative project for developing the economic interests of a large number of countries representing one quarter of world's population. The Commonwealth Foreign Ministers meeting at Colombo in 1950 came to the conclusion that countries of South and South-East Asia were economically undeveloped and that co-operation was needed to develop them and to raise the standard of living of the people of those countries. This conclusion led to the formation of the Colombo Plan which has for its object the increase of food supplies and industrial development of the countries of South and South-East Asia. The States which are parties to the Plan are: India, Pakistan, Ceylon, the Federation of Malaya, Singapore, British Borneo, Burma, Combodia, Nepal, Indonesia, Laos, Vietnam, Thailand, Phillipine Republic, Australia, Canada, New Zealand, Japan, the United Kingdom and the United States.

The Plan works through a Consultative Committee which meets annually to review and assess the work done, to deliberate on the task ahead and to solve economic problems of the members. Every country which adheres to the Plan is free to undertake its development programme and, in case of difficulty, to place the matter before the Consultative Committee. Countries within the Plan are, when necessity arises, given

financial aid by other countries in the form of outright grants, inter-Governmental loans, and private grants. Technical assistance to undeveloped countries is the best form of aid which is frequently forthcoming. Financial aid and technical assistances come both from countries inside and outside the Plan. Capital aid in the shape of machinery and other equipment is also given.

The Colombo Plan is working well and has resulted in great progress in Asian countries within it. The co-operation of the countries of the world in the achievement of the object of the Plan has led to the increase of the standard of living in Assian countries.

2. General Agreement of Tariffs and the Trade G. A. T. T. (1947).—This agreement was signed by 23 countries on October 30, 1947. Fourteen more countries have joined it with the result that the Agreement governs 80 percent of the trade of the whole world. It aims at laying down rules of international trade, at providing for reduction and stabilization of tariffs and also at furnishing a forum for consultation on problems of trade.

The parties to the Agreement are free to withdraw and thus lose the benefits which are available under the Agreement. They get a number of concessions which would not otherwise be available to them. The Agreement provides that parties to it are required to accord all advantages, favours and privileges and immunities which they may grant to any other country. Reduction of tariffs barriers has been rendered possible through the terms of the Agreement.

Many concessions under the Agreement are available to under-developed countries. The Agreement provides for a number of rules of trade dealings with matters such as taxation, freedom of transit, the right to impose antidumping duties, custom formalities and subsidies.

A 'panel on complaints' consisting of representatives of the parties to the Agreement is maintained for the decision of disputes that may arise and may call for settlement.

3. The Organization for European Economic Co-operation (OEEC).—This is a big economic co-operative organization having for its object the economic recovery and development in Western Europe and its dependent overseas territories The Organization consists of the Council which takes decisions, the Executive Committee which assists the Council and a

number of committees dealing with matters coming within the scope of the Organization.

This Organization in 1953 established the European Productivity Agency (E.P.A) for assisting member countries in increasing their production. The E. P. A. acts as a clearing house for national producing centres, functions to furnish information about production and provides a centre for study and discussion of major problems concerning production. It also aims at promoting co-operative research, dissimination of management techniques, training and education of management and trade unions, agricultural productivity work, information and assistance to under-developed areas.

4. **European Coal and Steel Community (E. C. S.C.)**—The Treaty establishing the European Coal and Steel Community was signed on April 18, 1951 and came into force for fifty years on July 25, 1952. It was ratified by six States, *viz.*, Belgium, France, the Federal Republic of Germany, Italy, Luxemburg and the Netherlands. The Community aims at fostering a spirit of unity and removing one of the historic causes of rivalry among the countries of Western Europe by granting to all member countries access on equal terms to the resources and materials of the Community's Coal and Steel industries. It further seeks to create a common market in Coal and Steel among the member countries, by removing quantitative restrictions, import and export duties and similar charges, by prohibiting State subsidies or impositions, and by eliminating other restrictive or discriminatory business practices.

The Community has four organs through which it works. There is the High Authority consisting of nine members, one of whom is co-opted by the eight members who represent the member-States. The High Authority is an executive body of the Community, and is assisted by a Consultative Committee. The Common Assembly is the Parliament of the Community and is its second organ. It consists of 78 members drawn in agreed proportions from the Parliament of each of the member-States. The third organ is the Council of Ministers and fourth is the Court of Justice which deals with judicial problems of the Community.

5. **The European Atomic Energy Community.**—This was set up as a result of the Eurrotam Treaty which was signed on March 25, 1957 at Rome by six countries. The Assembly, the Council of Ministers, the Economic and Social Committee and the Court of Justice established under the

European Economic Community will perform their functions for the European Atomic Community.

The Community has for its objective the development of research through the establishment of the Community Nuclear Research Centre, the co-ordination, promotion and assistance of research in member-States, the dissemination of information and the acquisition of patent rights, the estab lishment of health and safety standards, the planning and publication of production and investment programmes, grant of special privileges to joint enterprises declared to be Community enterprises, and the supply of raw materials on the principle of equal access to resources.

6. **European Economic Community** (EEC).—This Community came into existence in pursuance of a Treaty which was signed by six countries on March 25, 1957 at Rome. The Treaty provides for progressive reduction and abolition of Customs duties between members of the Community by stages, common transport policies in the elemination of discriminatory transport charges, progress towards the alignment of social policies, creation of the European Social Fund to aid the retraining and re-employment of workers, the establishment of businesses and free movement of capital and labour within the Community, the establishment of European Investment Bank, assistance in the development of less developed areas and promotion of certain projects beyond the resources of individual member-States.

The Community has five organs : A Council of Ministers, the European Commission, the Court of Justice, the Assembly and the Economic and Social Committee.

CHAPTER XXXIII

INTERNATIONAL ORGANIZATION AND SPECIALIZED AGENCIES

We have already noticed that one of the purposes of the United Nations is to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian nature. The Charter provides for bringing into relationship with the United Nations the

various specialized agencies established by inter-governmental agreement and having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health and related fields It is also provided that the United Nations Organization will make recommendations for the co-ordination of the policies and activities of these specialized agencies. These provisions recognise the fact that there are in existence institutions which are functioning for the promotion of common interests of the States It is, therefore, necessary for a student of International Law to get an idea of the working of some of these important institutions :—

1. The International Labour Organization. (I. L. O.)— This is an important international organization which though closely connected with the League has survived it This organization was better known as I. L. O a creation of the Treaty of Versailles which provided that the original members of the League shall be the original members of the organization and that membership of the League of Nations shall carry with it the membership of the organization. After the extinction of the League the Chairman of the Governing Body of this Organization entered into an agreement with the President of the Economic and Social Council for the purpose of bringing International Labour Organization into relationship with the United Nations. This agreement was approved by the General Assembly and International Labour Organization came into relationship with the United Nations.

There are three organs of the I. L. O., the General Conference, the International Labour Office and the Governing Body. The General Conference is composed of four representatives of each of the members. Out of these four representatives two are Government delegates the third represents the employers and the fourth represents the workers. All the four representatives are entitled to vote at the Conference which meets at least once a year. The Conference adopts recommendations and conventions on the vote of two-thirds of the members. A recommendation of the Conference enunciates principles for the purpose of guiding the States in the matter of labour legislation. States are not bound to make labour legislation on the principles contained in the recommendations of the Conference but they are bound to place those recommendations before the proper legislative authority. A convention of the Conference though not signed by the delegates of the member-States is binding on the member-States which are under an obliga-

tion to bring it before the proper legislative authority for enactment or other action. The member States are bound to make report annually to the I. L. O. as to steps taken to bring its legislation into conformity with the Convention of the Conference.

The International Labour Office is the permanent Secretariat of the I. L. O. and is located at Geneva. It prepares documents for the meetings of the Conference and the Governing Body, studies and reports on social and economic questions and collects and distributes information on the subject. It makes a survey of the application of the Conventions and recommendations of the Conference in the various States of the world. The Labour office has its branches at London, New Delhi, Ottawa, Paris, Rome, Shanghai and Washington.

The Governing Body is the executive organ of the I. L. O. It is composed of thirty-two members of which sixteen represent Governments, eight elected by employers' delegates to the Conference and eight represent labour and elected by workers' delegates to the Conference. The Governing Body appoints the Director-General of the International Labour Office, supervises the work of the Labour Office, prepares agenda for the Conference, conducts investigations and makes studies through various committees.

Besides these organs the I. L. O. acts through various specialized committees. The I. L. O. has since its establishment been engaged in promoting social progress throughout the world.

2. **World Health Organization (W.H.O.)**—The promotion of social interests common to all the States requires co-operative action as it is not within the powers of an individual State to cope with the huge problems connected with these interests. Public health constitutes one of the major social interest in Promotion of which the whole community of nations is interested. International co-operative action in the field of public health dates from 1892 when the International Sanitary Convention was signed at Venice. This was followed by a number of Cholera Plague Conventions. Further improvement in this direction was made through revised conventions. The League of Nations established its own Health Organization by setting up a Health section in its Secretariat and a Health Committee composed of qualified representatives of various States.

The establishment of the United Nations made co-ordination of the various health activities possible and the result was that a Conference in which sixty seven States took part was held in 1946 at New York and the present World Health Organization was established. This W H.O. has now taken over the health work performed by the United Nations Relief and Rehabilitation Administration (U.N.R.R.A.) which was established in 1943 for carrying out general relief work in areas occupied by enemy armies during the war.

The W.H.O. has its objective " the attainment by all peoples of the highest possible level of health". Its activities include advisory services to the nations of the world for development of their health administration and central technical services for promotion of the study of the health problems, establishment of an international pharmacopoeia and publication of health statistics.

The main organs of the W.H.O. are the World Health Assembly, the Executive Board and the Secretariat. The World Health Assembly is the legislative organ and meets once a year to determine the policy and the programme of the W.H.O. The Executive Board is a smaller body and meets at least twice a year to give effect to the decisions of the General Assembly. The Secretariat under the Director General is engaged in the administrative work of the W.H.O. Besides these there are a number of Expert and Technical Committees which assist the Organization in the discharge of its functions.

3. **Food and Agriculture Organization (F A.O.** .—This is another important socio-economic Organization and is generally known as the F. A. O. It was established in 1945 and is a highly specialized agency having for its objectives the promotion of re-search in the field of agrlculture, the advancement of effective methods of production and distribution of food products and the raising of standards of nutrition. The following are the organs of the F.A.O.:—

(*a*) Conference composed of representatives of the member States.
(*b*) Executive Committee appointed by the Conference.
(*c*) Director General for the supervision of the Administrative Bureau.

4. **The United Nations Educational, Scientific and Cultural Organization (UNESCO)** — The constitution of the UNESCO was signed by fifty-four States on November 16, 1945. The preamble of the Constitution states that 'since wars begin in the minds of men it is in the minds of men that the defences of

peace must be constructed and that everlasting peace must be founded upon the intellectual and moral solidarity of mankind.'

The purpose of the Organization is to promote collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for human rights and fundamental freedoms.

The membership of the UNESCO is open to all the members of the United Nations. Its organs are General Conference, Executive Board and Secretariat. The General Conference which consists of representatives of the member-States determines the policy and chalks out the programme of the Organization. The Executive Board consists of eighteen members elected by the General Conference and its function is to carry out the programme adopted by the Conference The Secretariat consists of the Director General and the staff. The Organization is assisted in its work by various national commissions. The UNESCO has been brought into relation with the United Nations under an agreement signed in 1947.

5. **The International Refugee Organization (IRO)**—The objective of this Organization is to repatriate refugees and displaced persons and to assist in the re-settlement of those who for valid reasons could not return to their countries of origin. The constitution of this Organization was adopted by the General Assembly of the United Nations in 1946.

The IRO works through a General Council, an Executive Committee and a Secretariat. The General Council shapes the policy of the Organization, while the Executive Committee carries out the policies of the Council and takes emergency policy decisions.

6. **The International Law Commission** (I.L.C.)—This was established by the General Assembly in 1947 for the promotion of the progressive development of International Law and its codification. On its establishment the General Assembly asked the Law Commission to formulate the principles of International Law as recognised in the Charter and the judgment of the Nuremberg Tribunal and to prepare a draft code of offences against peace and security of mankind and a draft declaration on rights and duties of States. This Assembly elected fifteen members for the Commission in November, 1948.

The Commission prepared the draft Declaration on Rights and Duties of States consisting of fourteen articles. The draft Declaration stated that the States have four rights, *viz.*, right to independence, to exercise of jurisdiction over State territory in

accordance with International Law, to equality in law and to individual or collective self-defence against armed attack. The draft enumerated ten duties of the States. This draft Declaration was referred by the Assembly to the members for suggestions.

The Commission formulated seven principles of International Law recognised in the Charter and the judgment of the Nuremburg Tribunal. The Commission also defined crimes against peace, War crimes and crimes against humanity. These principles were also sent to Member-States for their comments.

7. International Civil Aviation Organization(I.C.A.O.)— The International Civil Aviation Conference held at Chicago in 1944 adopted the Convention for the establishment of the International Civil Aviation Organisation This Convention superseded the provisions of two earlier agreements, the Paris Convention of 1919 and the Pan-American Convention on Commercial Aviation of 1928.

The aim of this Organization is to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport. The Organization has an Assembly, a Council, a President of the Council and a Secretary-General. The Assembly consists of members of the Organization, each having one vote. The Assembly decides the policy of the Organization, votes on the budget and deals with questions not specifically referred to the Council. It is convened annually by the Council. The members of the Council number twentyone who are elected by the Assembly. The Council executes the directives of the Assembly, elects its President, appoints the Secretary-General and manages the financial affairs. It is an executive body and is assisted by an Air Navigation Commission and by four Committees. The Secretary-General appoints the staff of the Secretariat and supervises the activities of the Secretariat. The Organization maintains field offices which establish a link between the members and the Organization.

8. International Monetary Fund (I.M.F.)—The United Nations Monetary and Financial Conference which met in 1944 adopted the Articles of Agreement of the International Monetary Fund.

This Fund was established to promote international monetary co-operation and to provide for a machinery for consultation and collaboration on international monetary

problems. The main purposes of this Fund are to facilitate the expansion and growth of international trade, to develop the productive resources of all members, to promote exchange stability and to give confidence to members by making the Fund's resources available to them under adequate safeguards.

The Fund works through a Board of Governors, Executive Directors, a Managing Director and a Staff. The Board of Governors exercises the powers of the Fund and is composed of one Governor and one alternate appointed by each member. The voting power of the Governors is in proportion to the size of the quota of the members which they represent. The Executive Directors, as their designation signifies, are responsible for the general operation of the Fund and exercise the powers delegated to them by the Board of Governors. The Managing Director is elected by the Executive Directors and he presides over the meetings of the Executive Directors.

9. International Bank for Reconstruction and Development.—The United Nations Monetary and Financial Conference which met at Brettonwoods, New Hampshire (United States in 1944 adopted the Articles of Agreement in respect of the International Bank for Reconstruction and Development. This Bank is separate from the International Monetary Fund, although they have the same members.

The main purposes of this Bank are to assist the members in reconstruction and development work by facilitating the investment of capital for productive purposes, to promote private foreign investment by guarantees of and participation in loans and other investments made by private investors, and to make loans for productive purposes out of its own resources or from funds borrowed by it.

The Bank has a Board of Governors, Executive Directors, a President, other officers and a staff. The Board of Governors is vested with all the powers of the Bank. The executive Directors have powers delegated to it by the Board of Governors. The Executive Directors function as a Board which is presided over by the President elected by the Executive Directors. The President is the chief executive officer of the Bank.

10. Universal Postal Union (U.P U.)—This Union was established in 1875 under the Universal Postal Convention adopted by the Postal Congress of Berne held in 1874. It was

first known as the General Postal Union. At the Congress of Paris in 1878 the name was changed to Universal Postal Union. In 1948 the General Assembly of the United Nations asked the Universal Postal Union to help it in the establishment of a United Nations Postal Administration. It was then decided that the United Nations could set up its Postal Administration adhering to the Union. The United Nations Postal Administration is thus affiliated to the Universal Postal Union.

This Union aims at improving the exchange of international mails and of postal services throughout the world through international collaboration. The Union fixes the international rates which may be adopted by any postal administration of the world. The International Bureau is the permanent central organ of the Union and is located at Berne. It serves as a connecting link, a centre of information and consultation for the administration of its members.

11. International Tele-communication Union (I.T.U.) —This Union was established in 1865 as the International Telegraph Union. In 1932 the International Telegraph Union on account of combination of the Telegraph Convention with the Radio Telegraph Convention came to be known as the International Tele-communication Union. As a result of a Conference held in 1947 the organization entered into an agreement with the United Nations and the Union was recognised as a specialized agency for tele-communications. A new Convention was also adopted to give effect to the changes that were brought about in the structure and the status of the Union. In 1952 yet another Convention was adopted at the Buenos Aeris Conference for facilitating the work of the Union.

The purpose of the Union is to promote the development and efficient operation of technical facilities for enhancing the utility of tele-communication, to bring about international co-operation for the improvement and rational use of telecommunication and to harmonize the actions of nations in the achievement of these common laws. The functions of the Union are to allocate 'to the several radio communication services groups of radio-frequencies suitable for providing the channels of communications required by these services, to establish lowest rates of tele-communication services, to promote the adoption of measures for insuring safety of life through tele-communication and to make studies and recommendations, collect and publish information for the benefit of its members.

12. World Meteorological Organization (W.M.O.)— This Organization owes its establishment to the Conference of Directors of the International Meteorological Organization (I.M O.) held at Washington in 1947. The Convention adopted at the Conference came into force in 1950 when the World Meteorological Organization came into being.

This organization was established "with a view to co-ordinating, standardizing and improving world meteorological information between countries in the aid of human activities." Its purpose is to facilitate international co-operation in the establishment of network of stations and centres to provide meteorological services and observatories, to maintain a system of rapid exchange of weather information ; to further the application of meteorology to aviation, shipping, agriculture and other human activities and to encourage research work in meteorology.

The Organization has a President and two vice-Presidents and also a staff. It works through a World Meteorological Congress, an executive committee, regional association committees and technical commissions. The Congress meets once a year. The Organization participated in the preparations for the International Geophysical year (1957-58).

13. Inter-Governmental Maritime Consultation Organization (I.M C.O.).—The United Nations Maritime Conference held in 1948 at Geneva adopted a Convention for the establishment of this organization. The purposes of the Organization are to provide machinery for co-operation among the Governments concerning regulations and practices relating to technical matters affecting international shipping, to encourage highest standards of maritime safety and efficient navigation and to promote availability of shipping services to world trade.

14. International Finance Corporation (I.F.C.)—This Corpora tion was established in July 1956 and becameas pecialized agency of the United Nations in 1957.

The chief purpose of the Corporation is to further economic development by encouraging the growth of productive private enterprise in its members The Corporation aims at providing funds for private enterprises with a view to the development of member countries. It acts through a Board of Directors and a President.

15. International Atomic Energy Agency—This Agency was established on July 29, 1957 as a result of an International Conference held at New York. A statute of the Agency was adopted at the Conference. An agreement defining the relationship of the Agency with the United Nations was approved by the General Assembly on November 14, 1957.

The purpose of the Agency is to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity of mankind throughout the world and to prevent the use of atomic energy for destructive purposes.

The statute provides for annual General Conference, a Board of Governors, and a staff with a Director-General The Conference is to meet every year to discuss matters connected with the object of the Agency : The Agency has at present 65 members. It has an ambitious programme and its activities are calculated to be beneficial to humanity.

CHAPTER XXXIV

IMMUNITIES OF INTERNATIONAL ORGANIZATION AND THEIR OFFICIALS.

Immunities under the Covenant of the League.—The Covenant of the League provided in Article 7 that the representatives of the Members of the League and the Officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities. It also makes the buildings and other properties occupied by the League or its officials or by representatives of its Members attending the meetings of the League inviolable These provisions enabled the officials of the League and the delegates of the Member-States to enjoy diplomatic immunities and privileges. It is therefore clear that the person and property of the League officials and its delegates were sacred and inviolable. They were exempt from all taxes such as income tax and property taxes and enjoyed immunity from the civil and criminal jurisdiction of the Country to which they came on business of the League. The buildings and other properties of the League were also inviolable. It must however be noted that diplomatic immunities and priviliges could be enjoyed by officials and the representatives of the Members of the League only when they were

engaged in the business of the League. It is thus obvious that an official of the League going to a Country on a pleasure trip could not avail any of the diplomatic immunities and privileges.

In the case of *Swiss Confederation* v. *Justh* (1927) the Swiss court held that the person of Count Bethlen, the representative of Hungary at the League was inviolable and punished the person who had attached the Count. The same Court in the case of V. v. D. (1927) held that the representative of Serb-Croat- Slovene Kingdom was immune from the civil jurisdiction of the Country and in this view of the matter dismissed the case against the representative for maintenance.

Immunities of the United Nations Delegates and Officials.—The Charter of the United Nations differs from the Covenant of the League on the question of immunities and privileges to its delegates and officials. While Article 7 of the Covenant accords 'diplomatic privileges and immunities' Article 105 of the Charter grants 'such privileges and immunities as are necessary for the independent exercise of their functions." The omission of the word 'diplomatic' in Article 105 of the Charter is very significant. The Charter provides that the United Nations Organization 'shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.' It further provides that the representatives of the Member-States and the officials of the United Nations shall enjoy such priviliges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. The General Assembly has been given the discretion to make recommendations with regard to the nature of the privileges and immunities that are to be enjoyed by the representatives of the Member-States and the officials of the United Nations and to propose conventions to the Members with regard to the matters connected with privileges and immunities.

The First General Assembly in 1946 adopted a Convention on the privileges and immunities of the United Nations. In 1947 it approved a Convention on the Privileges and Immunities of Specialised Agencies. These conventions thus regulate the matter of privileges and immunities that can be claimed by the officials of the United Nations and representatives of the Member-States. The representatives of the Member-States enjoy privileges and immunities greater than those available to the officials of the United Nations. The United States have enacted International Organization's Immunity Act to enable officials of the United Nations and the representatives

of the Member-States to enjoy necessary privileges and immunities.

The Courts of the United States in the cases of *Tsiang* v. *Tsiang* (1949 , *City of New Rochelle* v. *Page Shorp* (1949), *Friedberg* v. *Santa Cruz* (1949) held that the representatives of the Members of the United Nations and their staff were immune from the civil and criminal jurisdiction of the country. In the case concerning *Reparations far injuries to the United Nations Agents* the International Court of Justice held that the persons employed in the service of the United Nations were inviolable.

The words 'necessary for the independent exercise of their functions in connection with the Organisation' were strictly construed in the case of the *United States* v. *Coplon* and *Gulitchew* (1949) in which it was held that unlawful espionage was not a function of the accused as an employee of the United Nations and a person guilty of such conduct could not claim inviolability.

Immunities of the Judges of the International Court.—Article 19 of the Statute of the International Court of Justice makes diplomatic privileges and immunities available to the Judges when engaged upon the business of the Court. The Dutch Government has agreed to allow the Judges of the International Court of Justice and the Registrar of the Court the same privileges and immunities as are available to the Heads of States. It grants to high officials of the Court those privileges and immunities which are enjoyed by Secretaries of Diplomatic Missions at the Hague. The other officials of the Court enjoy the immunities of the personnel of the Diplomatic Agents. The Judges and officials of the Court having Dutch nationality are immune from the civil and criminal jurisdiction of Dutch Courts in respect of acts done in performance of their duties as judges and officials of the Court. Their salaries are exempt from income tax.

The members of the Permanent Court of Arbitration when present in foreign countries in connection with their official duties enjoyed diplomatic privileges and immunities. Article 46 of the Hague Convention (1907) provided for these immunities.

Immunities of International Commissions and Unions.—There is no rule of International Law by reason of which the officials of all kinds of International Commissions and Unions are entitled to the same privileges and immunities as are available to diplomatic agents and their staff. The

States are under no obligation to accord privileges and immunities to the officials of an international body. The matter of privileges and immunities is generally regulated by the provisions of the instrument establishing such international body or by the terms of a treaty.

The Treaty of Versailles contained an agreement of Germany to accord diplomatic privileges or immunities to the members of the Reparations Commission. The treaties establishing the International Commission of the Danube and of the Elbe contained provisions entitling the officials of the Commissions to enjoy diplomatic privileges and immunities.

CHAPTER XXXV

THE INTERNATIONAL COURT OF JUSTICE

History.—The first step towards maintenance of peace among States is to provide for an impartial tribunal before which disputing States may submit their differences for settlement. The settlement of disputes may be either through arbitral tribunals or International Courts. During the nineteenth century various States favoured the idea of etablishing an International Court of Justice and the First Hague Conference after discussing the matter, brought into being a Permanent Court of Arbitration. This was a court in name only but it was capable of deciding the disputes between nations. "The so-called Permanent Court of Arbitration was nothing but a list of persons out of which the judges forming a tribunal of arbitration could be chosen."[1]

The second Hague Conference took up the question of creation of an International Court at the instance of the United States delegation which proposed 'the development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility." A scheme for the establishment of such a court

1. Hans Kelsen—International Law p. 317.

was prepared but as Nations great and small differed as to the method of selection of the judges no good result came out.

An experiment of an international court on a small scale was made by the United States and five Central American Republics which met at the Central American Peace Conference of 1907. As a result of this conference the Central American Court of Justice consisting of five judges was established. The Signatory States agreed to submit their disputes to this court, which was established for a period of ten years. In 1917 this Court ceased to exist.

It was in 1919 that the Peace Conference took up the question of establishing an International Court of Justice. The Covenant of the League of Nations required the Council to formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice having jurisdiction to hear and determine any disputes of an international character which the States might submit to it and to give advice upon questions that might be referred to it by the Assembly or the Council. The Council appointed a Commission of Justice and the plan for such a court was prepared. After the approval of this plan by the Council and the Assembly the statute of the Court was ratified by the member States. Thus the Permanent Court of International Justice was created. The one great weakness of this Court was that its jurisdiction depended upon the agreement of the disputing parties. This Court worked admirably well in its own sphere and it may be safely said to its credit that it settled a large number of knotty international problems.

Dumbarton Oaks Conference.—At the Dumbarton Oaks Conference it .was decided that there should be a World Court but no agreement had been reached as to the question whether there should be an alto- gether new court or the Permanent Court of International Justice should continue with certain modifications Some of the delegates favoured the continuance of the old court while others suggested the creation of a new court with the new organization. At the invitation of the sponsoring Powers of the San Francisco Conference the United Nations Committee of jurists met at Washington in April 1945 and drew up a plan for the New International Court. The San Francisco Conference decided upon a new court and adopted the plan proposed by the committee of jurists. The International Court

of Justice was agreed to be the principal judicial organ of the United Nations.

The collapse of the League of Nations caused the closure of the Permanent Court of International Justice which ceased to function on the resolution of the Assembly in April, 1946. The new court thus coming into existence met for the first time at the Hague on April 3, 1946.

The Charter and the Court.—The Charter in Art. 92 provides that the International Court of Justice shall be the principal judicial organ of the United Nations and that it shall function according to the statute forming an integral part of the present Charter.

It is also laid down in the Charter that all members of the United Nations are *ipso facto* parties to the statute of the court and a member may become a party to the statute on conditions to be determined by the General Assembly upon the recommendations of the Security Council.

The members of the United Nations are under an obligation to comply with the decision of the International Court of Justice in cases to which they are parties. It is provided that if a party fails to comply with the decision of the Court the other party has a right to approach the Security Council which will decide as to how the decision of the court be made effective.

The International Court of Justice has to render advisory opinion on any question submitted to it by the Assembly or the Security Council. The other organs of the United Nations and specialised agencies may be authorised by the General Assembly to seek advice of the Court on legal questions arising within the scope of their activities.

The Charter leaves the Members of the United Nations free to have their disputes settled by tribunals other than the court by virtue of an agreement.

Organization of the Court

(*a*) **Judges.**—The International Court of Justice is to consist of Judges elected regardless of their nationality from among persons of high moral character, who possess the qualification required in their respective countries for appointment to the highest judicial offices or who are *juris consults* of repute in International Law. The Court is to consist of fifteen

Judges, no two of whom will be nationals of the same State. The Court has a President and a Vice-President who are elected for three years.

The Judges of the Court are, unless they are on leave or prevented from attending by illness or other reasons duly explained to the President, permanently at the disposal of the Court. Special reasons may prevent a Judge of the Court from taking part in the decision of a particular question.

(*b*) **Election of Judges.**—The Judges of the Court are elected by the General Assembly and by the Security Council from a list of persons nominated by national groups in the Permanent Court of Arbitration or from persons nominated by national groups appointed for this purpose by Governments of those States which are not represented on the Permanent Court of Arbitration. The procedure of nomination of the judges is laid down in Articles 5 and 6 of the Statute. The Secretary-General then prepares a list of nominated persons in alphabetical order and sends it to the General Assembly and the Security Council which proceed independently of each other to elect the Judges. The candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council are considered to be elected. In the event of more than one national of the same State obtaining an absolute majority of votes both of the General Assembly and of the Security Council the e ldest of these is considered to be elected.

The Judges are elected for nine years and are eligible for re-election. At the first election in 1946, however, the term of five judges was fixed at three years and of five more at six years. The period that each Judge was to serve was decided by lots drawn by the Secretary-General. The second election took place in 1948.

(*c*) **Disabilities and Immunities of Judges.**—The Statute of the Court lays down that a Judge is not permitted to :—

(1) exercise any political or administrative function, or engage in any other occupation of a professional nature;

(2) act as agent, counsel, or advocate in any case ;

(3) to participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties or as a member of a

national or International Court or of a commission of enquiry or in any other capacity.

In case of doubt on any of the above points the Court is required to give its decision. No Judge is to be dismissed unless, in the unanimous opinion of the other judges he has ceased to fulfil the required conditions.

The Judges of the Court when engaged on the business of the Court enjoy diplomatic privileges and immunities.

d) **Sitting of the Court.**—The International Court of Justice has its seat at the Hague. It can also sit and exercise its functions elsewhere whenever it considers it desirable. The President and the Registrar reside at the Hague.

The Court is permanently in session except during the judicial vacations the dates and the duration of which are fixed by the Rules of the Court.

It is the full court that sits for decision of cases except where it is expressly provided otherwise. A quorum of nine judges suffices to constitute the Court.

The Court is authorised to form from time to time one or more chambers composed of three or nine judges as may be determined by it for dealing with particular type of cases. It may also form a chamber composed of any number of judges as it may deem proper for the purpose of deciding a particular case. These chambers may hear and determine any case if the parties so desire. The judgment of the chambers shall be considered to have been rendered by the Court. The chambers may sit at the Hague or at any other place with the consent of parties.

(*e*) **Voting procedure and judgment.**—The rule of majority prevails in the decision of the cases brought before the Court. In the event of an equality of votes, the President or the Judge who acts in his place has a casting vote. The judgment shall state the reasons on which it is based and shall also contain the names of the Judges who took part in the decision. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any Judge is entitled to deliver a separate opinion.

The judgment is to be signed by the President and by the Registrar. It is read in open court after due notice has been given to the agents of the parties to the case.

The judgment of the Court is final and not open to appeal.

During the pendency of a case the Court is competent, if it considers proper in the circumstances of the case, to indicate provisional measures which are necessary to preserve the respective rights of either party.

(*f*) **Language of the Court.** –The official language of the Court is French and English The parties may agree to either of these languages in which the case is to be conducted. In case the parties do not agree as to language for the conduct of the case, they are free to use any one of these two languages in their pleadings. The judgment of the Court is pronounced in that language to which parties have agreed for the conduct of the case or in both French and English in absence of an agreement between the parties. The court may authorise the parties to use a language other than English and French.

Procedure of the Court.—The Court entertains a case either on notification of a special agreement or on a written application made to the Registrar. The Registrar communicates the application to all concerned and notifies to members of the United Nations through the Secretary-General.

The parties are represented by agents and may be assisted by counsel or advocates before the Court. The agents, counsel and advocates enjoy privileges and immunities necessary to the indpendent exercise of their duties.

The procedure of the Court consists of two parts : written and oral. The written proceedings consist of the communications to the Court and to the parties, of memorials, counter-memorials and if necessary, replies and also all papers and documents in support. The oral proceedings consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

The hearing is controlled by the President or by the Vice-President in the absence of the President. The hearing in Court is public unless the Court directs otherwise.

The Court makes orders for the conduct of the case, decides the form and the time in which each party must conclude its arguments and make all arrangements connected with the taking of evidence.

After the agents, counsel and advocates have completed their presentation of the case the President declares the hearing closed Thereafter the Court withdraws to consider the judgment.

Jurisdiction of the Court—The International Court of Justice has jurisdiction to hear and decide disputes arising between States. Only States are parties to the cases brought before the Court. The Court is open to all States which are parties to the Statute. It is also open to States not parties to the Statute on conditions which have been laid down by the Security Council. States not parties to the Statute can invoke the jurisdiction of the court if they deposit with the Registrar of the Court a declaration to the effect that they accept the Court's jurisdiction as specified in the Charter, the Statute and the Rules of the Court and that they undertake to comply in good faith with the decision of the Court as provided in Article 94 of the Charter. Such declarations may be either general, that is to say, covering all disputes that may arise or may be particular, that is to say, may be in respect of a particular case.

No State is obliged to submit its dispute to the decision of the Court. Article 36 of the Statute defines the jurisdiction of the Court as comprising all cases which the parties may refer to it and all matters specially provided for in the Charter or in the treaties and conventions in force. In order that the International Court of Justice may take over the work intended for the Permanent Court of International Justice the Statute provides that whenever a treaty or Convention in force requires submission of a matter to the Permanent Court, the matter is to be brought before the International Court of Justice.

Compulsory Jurisdiction.—The compulsory jurisdiction of the International Court of Justice is derived from the consent of the States The Statute stipulates that States which are parties to it may at any time declare that they recognise as compulsory, *ipso facto* and without special agreement, in relation to any other State accepting the same obligation the jurisdiction of the Court in all legal disputes concerning :—

(*a*) the interpretation of a treaty ;

(*b*) any question of International Law ;

(*c*) the existence of any fact, which if established would constitute a breach of international obligation ;

(*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

This declaration may be unconditional or may be made on condition of reciprocity on the part of several or certain States or for a certain time. It is provided that declarations such as these made under Article 36 of the Permanent Court of International Justice and which are still in force shall be deemed as between the parties to the Statute of the International Court of Justice, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

A number of States hence made declarations accepting the compulsory jurisdiction of the Court in one way or another. Some States have accepted the compulsory jurisdiction with certain reservations. The United States accepted this jurisdiction for a period of five years with some very important reservations.

Besides the optional clause of the Statute the Court was given compulsory jurisdiction by the constitutions of many specialised agencies of the United Nations and many bipartite treaties. The Constitution of the Food and Agriculture Organization provides for reference of certain disputes to the Court and to arbitration. The Trusteeship Agreements usually confer jurisdiction on the Court in certain specified disputes. Some multilateral treaties also provide for the settlement of controvercies arising thereunder by the Court. A number of bilateral treaties of amity, commerce, trade, air navigation and alliance made after 1945 confer jurisdiction on the Court in respect of disputes.

Advisory Jurisdiction.—The Court has to render advisory opinion on questions referred to it by the General Assembly and by the Security Council. The other organs the United Nations and specialized agencies on being authorised by the General Assembly can also ask for the advice of the Court on matters within the sphere of their activities. The General Assembly has authorised a number of other organs and specialized agencies to seek advice of the Court on legal questions. The Trusteeship Council, Economic and Social Council, World Health Organization, International Civil Aviation Organization and the International Bank for Reconstruction and Development are some of the specialized agencies and organs of the United Nations that are privileged to seek advice of the

International Court of Justice on legal questions arising in the sphere of their activities. The opinion of the Court should be sought by making a written request containing an exact statement of the question on which opinion is asked for and accompanied by all documents which are likely to throw light on the matter.

The procedure of the Court in rendering opinion on legal questions is the same as is followed in regular cases submitted to the Court. It will therefore follow that States can appear and be heard on the questions raised. The opinion of the Court is nothing but a legal advice which the organs of the specialized agencies seeking them are not bound to follow.

In practice the advisory opinion of the Court has always been regarded as binding and no organ of the United Nations has so for taken action in conflict with the advisory opinion obtained by it from the Court.

Law applied by the Court.—The International Court of Justice is bound to decide a case brought before it in accordance with International Law. It has, in the determination of the questions raised before it, to apply :—

(*a*) International Conventions whether general or particular, establishing rules expressly recognised by the contesting States ;

(*b*) International custom, as evidence of general practice accepted as law ;

(*c*) The General Principles of Law recognized by civilized nations ;

(*d*) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Statute makes it perfectly clear that a decision of the Court has no binding force except between the parties and in respect of the particular case in which it was given. This provision shows that a previous decision of the Court is not an authority which must be followed but that it possesses a persuasive value.

The Court has also the power to decide a case *ex aequo et bono* (*i. e.* according to the principles of equity) if the parties

agree thereto. The parties have a right to get their disputes decided not according to International Law but according to principles of equity.

"The practical task of the Court is to determine according to law conflicts presented to it. The answers it gives are of necessity based on the legal techniques, the traditional materials, and the received ideals available to the judges, though these will include, by reason of the history of international law and the varied training of the judges those of many municipal legal systems which impact upon International Law. In so far as these fall short in guidance and as a non liquet is not open, the Court may be required to devise an answer as satisfactory to the parties as is consistent with the development of general rules binding on all States for the particular matter. The task cannot be an easy one at either level in view of the age-old confusions affecting the authoritative materials of International Law."[1]

Revision of Judgment.—The Statute makes a provision for the revision of the judgment of the Court. A revision of the judgment is permissible only when there is a discovery of some fact of such a nature as to be a decisive factor which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision. The ignorance of the party claiming revision of the fact discovered must not be due to negligence. An application for revision must disclose the fact or facts discovered after the judgment. The application must be made within six months of the discovery of the new fact. No application for revision will lie after ten years of the judgment sought to be revised.

The Court before actually revising its judgment has to admit the application for revision after recording its findings in express terms to the effect that there has been a dis covery of the new fact, and that the new fact has such a character as to lay the case open to revision. The Court may in its discretion before admitting the revision require the compliance of the judgment sought to be revised.

Execution of the decisions of the Court.—The Charter imposes an obligation on parties to a decision of the Court to comply with the decision. On the failure of a party to comply with the decision rendered by the Court the other party is permitted to take the matter to the Security Council. The Security Council may then consider the matter and may

1. Julius Stone : Legal Controls of International Conflicts p. 133.

make recommendations or decide upon measures to be taken to give effect to the judgment. Thus, the Security Council may, with a view to give effect to the judgment take, enforcement measures against the State guilty of non-compliance with the judgment. Instead of taking enforcement measures the Security Council may make recommendations to the parties concerning the matter. If the parties ignore the recommendations the Security Council, if it considers that non-campliance is likely to disturb the international peace, may adopt such measures as are indicated in Chapter VII of the Charter.

Cases decided by the Court.—Since its establishment as the judicial organ of the United Nations the International Court of Justice has been engaged in deciding cases and rendering advisory opinion on questions submitted before it. It will be interesting to note a few important cases that were brought before it.

The Corfu Channel Case.—This was the first case which came before the Court. During October 1946 the mines in the Corfu Channel damaged certain British Warships and caused injury to British naval personnel. The United Kingdom alleged that Albania was responsible while Albania denied this charge. The matter was taken by the United Kingdom to the Security Council in January, 1947. The Security Council recommended that the disputants should refer their dispute to the International Court of Justice.

The United Kingdom by its application asked the Court to decide that Albania was internationally responsible for the loss and injury and was liable to make reparations. Albania by its letter agreed to appear before the Court but it objected to the admissibility of the application of the United Kingdom on the ground that the application was not in conformity with Security Council's recommendation. The Court rejected this objection. Thereafter the disputing States entered into a special agreement whereby the following two questions were submitted to the Court :—

"1. Is Albania responsible under International Law for the explosions which occurred on October 22 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation ?"

"2. Has the United Kingdom under International Law violated the sovereignty of the Albanian People's Republic

by reason of the acts of the Royal Navy in Albanian waters on October 22, and on November 12 and 13, 1946, and is there any duty to give satisfaction ?"

On the first question the Court held that "the People's Republic of Albania is responsible under International Law for the explosions which occurred on October 22, 1946 in Albanian Waters and for the damage and loss of human life that resulted therefrom." On the second question it was held that the United Kingdom did not by acts of its navy of October 22, 1946 violate the sovereignty of Albania and that the United Kingdom by the acts of its navy of November 12 and 13, 1946 did violate the sovereignty of Albania. The Court further held that the declaration of the Court to the effect that the United Kingdom violated the sovereignty of Albania by the acts of its navy on November 12 and 13, 1946 was in itself appropriate satisfaction.

In the result Albania was held liable to pay £ 843,947 to the United Kingdom.

2. **The Anglo-Iranian Oil Company Case.**—Certain differences arose between the Government of Iran and the Anglo Iranian Oil Company on account of the passing of the Iranian Oil Nationalization Act of 1951. The United Kingdom made an application to the Court on the allegations that the Iranian Government being bound by the Convention of 1933 between the Anglo-Iranian Oil Company and the Iranian Government could not implement the Oil Nationalization Act and it was bound to submit the dispute to arbitration as agreed to under the Convention of 1933. The Court was asked to declare that the Iranian Government was bound to refer the dispute to arbitration under the terms of the Convention of 1933 and to accept and carry out the award, and that the implementation of the Nationalization Act of 1951 was contrary to International Law inasmuch as it would amount to unilateral annulment of the Convention. The United Kingdom further asked the Court to adjudge that the Iranian Government was liable to make reparations for the wrongful acts committed by it were in regard to the Anglo-Iranian Oil Company. Iran was duly informed of this application.

The United Kingdom also applied to the Court for indication of provisional measures under Article 41 of the Statute of the Court. This request was opposed by the Iranian Government. The Court on July 5, 1951 ordered that the Com-

pany should continue to carry on its operations in Iran under the direction of its management as it was continued before May 1, 1951 ; that the two Governments should do nothing to hinder the carrying on of the industrial and commercial operations of the Company and that the two Governments should ensure that no action as might aggravate the dispute was taken. The Court further asked the two Governments to agree to the establishment of a Board of Supervision for the management of the affairs of the Company during the pendency of the dispute.

The above provisional measures were disliked by the Iran Government which regarded that the Court exceeded its jurisdiction in indicating the provisional measures. On July 9, 1951 the Iranian Foreign Minister by cable to the Secretary-General withdrew Iran's acceptance of the compulsory jurisdiction of the Court.

3. **Reparations for injuries incurred in the service of the United Nations.**—This was a case for the advisory opinion of the Court. Count Bernadotte, the Mediator in Palestine and certain other agents of the United Nations were assassinated. The General Assembly referred two questions for opinion :

1. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* Government with a view to obtaining reparation due in respect of the damage caused (*a*) to the United Nations (*b*) to the victim or persons entitled through him ?

2. In the event of an affirmative reply on point 1 (b) how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national ?

The Court unanimously gave the opinion that the United Nations can bring an action in respect of injury suffered by an agent of the United Nations against a Member State or a non-member in respect of the damage caused to the United Nations. The majority in the Court (eleven as against four) rendered the opinion that the United Nations can bring an action both against Member States as well as against non-members for damages caused to the victim or to the presons entitled through him. By ten votes against five

the Court was of opinion that the United Nations can only bring a claim for reparation of damage to its agent by basing its claim upon a breach of obligations due to itself and that respect for this rule will normally prevent a conflict between the claims of the United Nations and those of the victim's National State.

This opinion is important inasmuch as it declares that the United Nations Organization possesses full international personality.

4. Admission of Members to the United Nations by General Assembly.—During 1946-1947 a number of states sought admission to the United Nations but the Soviet member of the Security Council vetoed their applications. The General Assembly asked the Court to give its opinion on the question whether the General Assembly can by its own decision admit a State to the membership of the United Nations in case the Security Council fails to make the recommendation.

The Court rendered the opinion that the General Assembly cannot admit a new member by its own decision without the recommendation of the Security Council.

5. International status of South West-Africa.—In accordance with the Mandate System of the Covenant of the League, South-West Africa was placed under the Mandate and the Union of South Africa was constituted the Mandatory with full powers of administration and legislation over it. With the establishment of the United Nations and the collapse of the League, South-West Africa should have been placed under the Trusteeship System of the Charter. In spite of the repeated recommendations of the General Assembly the Union of South Africa refused to place South-West Africa under the Trusteeship System or to submit report to the Trusteeship Council. This attitude of the Union of South Africa led the General Assembly in 1949 to seek the advisory opinion of the Court. The questions submitted to the Court were :—

'What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular :

(a) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa, and if so, what are those obligations ?

(*b*) Are the provisions of chapter XII of the Charter applicable and if so, in what manner, to the Territory of South-West Africa ?

(*c*) Has the Union of South Africa the competence to modify the international status of South-West Africa, or, in the event of negative reply, where does competence rest to determine and modify the international status of the Territory ?

The Court's opinion was :—

1 South-West Africa is a territory under the international Mandate assumed by the Union of South Africa.

2. The Union of South Africa continues to have the international obligations provided for under Article 22 of the Covenant of the League and the Mandate for South-West Africa The supervisory function is to be discharged by the United Nations to which annual reports are to be submitted.

3. The provisions of chapter XII of the Charter are applicable to the territory of South-West Africa but that the Union of South Africa was under no obligation to place South-West Africa under the Trusteeship system.

4. That the Union of South Africa cannot by an unilateral act modify the international status of South-West Africa and the competence to modify the international status of South-West Africa rests with the Union of South Africa acting with the consent of the United Nations.

6. Columbian—Peruvian Asylum Case. (1949).—The Peruvian Government holding Victor Raul Haya de la Torre the leader of a political party responsible for a military rebellion in Peru took proceedings to prosecute him for criminal offences. He was served with notices asking him to appear before the Examining Magistrate. Haya de la Torre sought Asylum in the Columbian Embassy at Lima on January 3, 1949. The asylum was granted and the Columbian Ambassador informed the Peruvian Government and asked for guarantees of safe conduct to enable Haya de la Torre to leave the country. It was also alleged by the Columbian Embassy that Haya de la Torre was a political refugee. The Peruvian Government contested this position and refused to allow a safe-conduct. The two Governments agreed to submit this controversy to the International Court of Justice. The case was submitted by the Columbian Government to the Court.

The Court decided that the Columbian Government which granted the asylum was not competent to make an unilateral declaration of the offence so as to bind the Peruvian Government. It further held that the Columbian Government was "not entitled to claim that the Peruvian Government should give the guarantees necessary for the departure of Mr. Haya de la Torre from the country with due regard to the inviolability of his person." In the counter-claim the Peruvian Government asked for a declaration that the act of the Columbian Government in granting asylum was in violation of the Havana Convention and that there was no urgency as is required by the Havana Convention, for the grant of the asylum. The Court held that the offence with which Mr. Haya de la Torre was charged was not a common crime and further that the grant of the asylum was not in conformity with the Havana Convention as three months had passed since the rebellion.

The Columbian Government applied for the interpretation of the judgment of the Court. The Court held that as no dispute arose as to the meaning and scope of the judgment the application for interpretation did not lie.

7. **Haya de la Torre case (1950).**—After the decision of the Asylum case the Peruvian Government asked the Columbian Embassy to deliver Mr. Haya de la Torre in pursuance of the Court's judgment. The Columbian Government refused to deliver the refugee and also instituted fresh proceedings by which the Court was requested to decide whether it was bound to deliver the refugee in terms of the earlier judgment and in the alternative, whether it was or was not bound to deliver the refugee to Peru "in accordance with the law in force between the parties and particularly American International Law."

The Court held that inasmuch as it has expressed the opinion in the earlier judgment that the offence with which the refugee was charged did not constitute common crime, the Columbian Government was not bound to surrender the refugee to the Peruvian authorities. It further held that the Peruvian Government was, in view of the irregularity of the asylum, entitled to claim the termination of the asylum and that asylum ought to have ceased after the earlier judgment.

Thereafter in pursuance of an agreement between the two Governments Mr. Haya de la Torre was granted a safe-conduct and he was allowed to arrive at Mexico.

8. Anglo-Norwegian Fisheries Case (1949).—In 1949 the United Kingdom complained that on account of a Norwegian decree of 1935 considerable areas of water off the Norwegian coast which in fact were part of the high seas had been closed to the fishing vessels of all nations The International Court of Justice was asked to define, in the light of the rules of International Law, the limits within which Norway was entitled to reserve a fisheries zone.

The Court by a vote of 10 to 2 found that the method used by Norway in its decree for the delimination of the fisheries zone was not contrary to International Law and by a vote of 8 to 4 held that the principles on which the baselines were fixed by Norway were not in violation of International Law.

9. Case concerning the Rights of nationals of the United States in Morocco (1950).—This case arose on proceedings initiated by the French Government before the International Court of Justice concerning rights of nationals of the United States in Morocco. The Court was asked to declare that the nationals of the United States were not entitled to a preferential treatment but were subject to the laws and regulations in force in particular those relating to imports.

The parties before the Court relied on the Act of Algeciras of 1906. The Court unanimously held that the Residential Decree of December 30, 1948 infringed the rights of the nationals of the United States acquired under the Act of Algeciras, because the provisions of the Decree exempted France from control of imports without allocation of currency but subjected the United States to such control. On the question whether the nationals of the United States had the right to have cases to which they were parties decided by the United States Consular Courts in the French Zone of Morocco the Court held that the word 'dispute' occurring in the Treaty of 1836 between the United States and Morocco referred to both civil and criminal disputes and that the consular jurisdiction was acquired in all cases in which a United States citizen or protege was a defendant. The Court further held that the citizens of the United States were entitled to invoke consular jurisdiction in so far as the subject matter came within certain categories of the Act of Algeciras. It did not accept the contention of the United States that the nationals of the United States were not subject to the application of the Moroccan Laws unless the laws had received the prior assent of the United States.

10. Ambatielos Case (1951).—This case was taken up by the International Court of Justice on the application of the Greek Government which asked for a declaration that the claim made by her national N. E. Ambatielos against the United Kingdom is to be submitted to arbitration in pursuance of the terms of the Treaties concluded in 1886 and 1926 and an agreement of 1926 between the Greece and the United Kingdom.

The United Kingdom objected to the jurisdiction of the Court on the ground that the Agreement of 1926 was not a part of 1926 Treaty and the Ambatielos dispute could not be submitted to the Court. The Greek Government, on the other hand, contended that 1926 Agreement was but a part of 1926 Treaty and the Court was competent to decide the matter on merit. The Court while holding that it had no jurisdiction to decide the dispute on merit was competent to grant the declaration that the Ambatielos claim must be referred to arbitration. Finally it held that the United Kingdom was, under the terms of the Treaty of 1886, bound to submit the dispute to arbitration.

11. Right of Passage through Indian Territory Case—The Portuguese Government filed an application against India on the allegations that Portuguese nationals and officials as well as foreigners authorised by Portugal had a right to cross Indian territory on their way from Daman in the Portuguese territory to the Portuguese enclaved territories of Dadra and Nagar Haveli and from Dadra to Nagar Haveli. This application further stated that inasmuch as India and Portugal had accepted the compulsory jurisdiction of the Court, the dispute was within the jurisdiction of the Court.

The Portugal case was that it exercised severeignty over certain areas in the Indian Peninsula which were divided into three districts of Goa, Daman and Diu, that the district of Daman comprised, in addition to its littoral territory, two parcels of land which were surrounded by Indian territory and constituted two genuine enclaves : Dadra and Nagar Haveli. Portugal asserted that it had an unquestionable right of passage to these enclaves and it complained that the Government of India had since July 1954 taken steps to prevent Portuguese officials and nationals from exercising their right of passage. The International Court of Justice was asked to declare that Portugal was the holder or beneficiary of the right of passage between these territories and that the action of India in interfering with this right was in violation of International Law. Portugal also requested the Court to adjudge that India

should immediately refrain from interfering with the Portuguese exercise of their right of passage. No action was however taken during 1955, as India challenged the jurisdiction of the Court.

As this dispute could not be settled, the International Court of Justice was again approached and after the completion of procedural formalities the case was heard on merits in September and October, 1959. The hearing of the case on merits was rendered possible by the terms of the new declaration made by India.

The Portuguese Government asserted in arguments that the right of passage rested on tacit consent and that it naturally and necessarily flowed from Portuguese sovereignty over the enclaves. Its main argument was that there was absolute need for this right of passage for the exercise of Portuguese sovereignty over the enclaves was not possible without this right of passage. The Indian Government maintained that Portugal had no right of passage and the mere fact that it is unable to exercise its sovereignty over the enclaves was not enough to place India under an obligation to allow such a passage. It also urged that the dispute fell exclusively within her domestic jurisdiction and the Court was not competent to decide the case.

The decision of the Court is awaited.

12. Reservations to Genocide Conventions (1951).— The General Assembly made a request for the advisory opinion of the Court on the effect of reservations in ratifying or acceding to the Convention of Genocide. The Court gave the following opinion :—

(*i*) "That a State which has made and maintained a reservation that is objected to by one or more of the parties to the Convention, but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention ; otherwise that State cannot be regarded as being a party to the Convention."

(*ii*) "That if a party to the Convention objects to a reservation which it considers incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention ; that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it

can in fact consider that the reserving State is not a party to the Convention."

(*iii*) "That an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to question 1 only upon ratification; until that moment such an objection merely serves as a notice to the other States of the eventual attitude of the signatory State; that an objection to a reservation made by a State which is entitled to sign or aceede but has not yet done so is without legal effect."

13. Effect of awards of compensation made by the United Nations Administrative Tribunal (1953 .—The General Assembly requested the Court to give its advisory opinion on the question whether the Assembly could refuse to give effect to an award of compensation made by the Administrative Tribunal in favour of a staff member of the United Nations whose contract of service had been terminated without his assent. The court was further requested to indicate the grounds on which this could be done.

The International Court of Justice on the basis of provisions of the Statute of the Tribunal, the Staff Regulations and the Rules of the United Nations gave the opinion that the award of the Tribunal was binding on the United Nations as the juridical person responsible for the proper observance of the contract of service and as the General Aesembly was an organ of the United Nations it was bound to carry out the directives made in the award. The Court did not express any opinion on the second question.

CHAPTER XXXVI

PERMANENT COURT OF ARBITRATION

Origin.—During the nineteenth century various States favoured the idea of establishing an impartial tribunal of international character for the settlement of disputes and the First Hague Conference of 1899 brought into being a Permanent Court of Arbitration. 'For the purpose of facilitating recourse to arbitration, the signatory powers undertook in 1899 to orgnanise a Permanent Court of Arbitration, and in 1907 it was agreed to maintain the Court which the earlier conference had established.'[1] It was announced by

1. Hyde.—International Law Vol. 2 (2nd Ed.) p. 1606.

the Convention for the Pacific Settlement of International Disputes that the arbitration had for its object "The settlement of differences between States by Judges of their own choice and on the basis of the respect for law."

Organisation.—The Court had the following three organs :

1. **The Permanent Administrative Council.**—It consisted of the diplomatic representatives of the contracting parties accredited at the Hague and the Secretary for Foreign Affairs of the Government of the Netherlands as the President. It had to control the International Bureau and adjudicate on all matters relating to the administration of the Court.

2. **The International Bureau.**—The International Bureau consisting of the Secretary-General of the Permanent Court of Arbitration and a small staff was to serve as record office and Secretariat. It was established in the Peace Palace at the Hague.

3. **The Court of Arbitration.**—Each of the signatory powers who were parties to the Conventions of 1899 and 1907 was entitled to select not more than four persons, "of known competency in questions of International Law, of the highest moral reputation and disposed to accept the duties of arbitrator." Their appointments were for a period of six years after which they could be renewed. Out of the list of possible Judges, the parties involved in a dispute were free to select the members of a tribunal to decide their difference. In case there was a disagreement between the parties referring the dispute to the Hague Tribunal over the selection of arbitrators, each of them was to appoint two to act in their behalf and these four so chosen were to select some one else as an Umpire. But all these five Judges had to be selected from the general list that is from the Permanent Court. Further improvements in the scheme and procedure were made by the Second Hague Conference of 1907 which provided for summary procedure in disputes about matters of secondary importance. To assure greater impartiality in the composition of the tribunal and to further facilitate the selection of the fifth member, provision was made that out of the two arbitrators appointed by the parties in controversy from the permanent list "one only can be its national or chosen from among the persons selected by it as members of the Permanent Court." Unless otherwise agreed to by the parties an arbitral award was final. The arbitrators however, could only exercise such

powers as were conferred upon them by the parties in the *Compromis*, the document by which the dispute was referred to the Court and in case the Court departed from the *Compromis*, 'by purporting to decide some question which was not submitted to it or by not applying the rules of decision agreed to by the parties', the award did not have the binding force. "Occasionally the departure from the terms of the *Compromis* has been so evident that the parties have agreed to regard the reward as null, and sometimes they have agreed to refer the question of nullity itself to a further arbitration."[1] The 'compromise' element is sometimes unduly exaggerated and it is said that the arbitral awards were merely quasi-diplomatic compromises. This does not seem to stand the test of impartial scrutiny. Judge *J.B. Moore*[2] rightly observed : "I have failed to discover support for the supposition that international arbitrators have shown a special tendency to compromise, or that they have failed to apply legal principles or to give weight to legal precedents. Indeed even in the abridged form in which many of the decisions cited in my History and Digest of International Arbitrations, published in 1898, were necessarily given in that work, nothing is more striking than the consistent effort to ascertain and apply principles of law approved by the best authorities, and to follow pertinent prior adjudications where any existed."

Moreover as *Starke*[3] says if arbitral awards were merely quasi diplomatic compromises, it would be difficult to explain how notable awards like the *Albama Claims, the Behring Sea fisheries* and so on have contributed to the growth of International Law.

Nature of the Court.—The Permanent Court of Arbitration though capable of deciding the disputes between nations was a Court in name only. "The so-called Permanent Court of Arbitration was nothing but a list of persons out of which the Judges forming a tribunal of arbitration could be chosen."[4] As observed by *Manley O Hudson*, "the name of the Permanent Court of Arbitration is really a misnomer, and by creating expectations which could not be fulfilled it may have

1. Brierly.—Law of Nations (Fifth Ed.) p. 278.
2. Moore.—International Adjudications : Ancient and Modern (1929-1936) Vol. I at p. xxxix-xc.
3. Starke : An Introduction to International Law (4th Ed.) p. 43.
4. Hans Kelsen : International Law p. 317.

been responsible for some deception of public opinion. The Permanent Court of Arbitration is not really a Court. Nor is it in any accurate sense a tribunal though it is often referred to as 'The Hague Tribunal'; instead it is a device for facilitating the creation of *ad hoc* tribunals. It is permanent only in the sense that a panel is permanently available from which arbitrators may be chosen, that the Administrative Council is constituted as a continuing body, and that a permanent International Bureau exists to facilitate the creation of tribunals."[1]

Cases decided.—About twenty arbitral tribunals have been appointed under the system since it was founded. These tribunals gave several important awards including those in the *Pious Fund Case* of 1902 between the United States and Mexico, the *North Atlantic Fisheries Case* of 1910 between the United States and Great Britain and the *Savarkar Case* of 1911 between Great Britain and France.

1. Pious Fund Case (1902).—A dispute arose between the United States and Mexico concerning the part of an old charitable fund which was left in trust by the Spanish subjects to the Society of Jesus for the spread of the Roman Catholic faith in the Californians. After the expulsion of the Jesuits from the Spanish Dominions the King of Spain continued to administer the trust until Mexico succeeded to its administration after achieving her independence. In 1848 Upper California was ceded by a treaty to the United States and the Government of Mexico refused to pay to the Church there any share of the interest accruing after the ratification of the treaty of cession. The issue was referred to Sir Edward Thornton, the British Minister at Washington who was selected the Umpire. He rendered the award in favour of the United States covering the period from 1848 to 1869. After paying the award Mexico asserted that the claim was extinguished thereby. The matter was again raised by the Church in California and in 1902 the issue was referred to the Permanent Court of Arbitration. The Tribunal had to decide whether Sir Edward Thornton's award brought the case within the limits of *res judicata* and if not whether the claim was just.

The Tribunal decided the case in favour of the United States and against Mexico. It found that the matter was within the principle of *res judicata* and computed the sum to be paid by

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1. Treatise On the Permanent Court of International Justice.

Mexico in annual instalments in order to extinguish the accrued annuities.

2. The Japanese House Tax Act[1] **(1904-1905).**—The parties to the dispute which arose in 1904 and 1905 were Great Britain, France and Germany on the one hand and Japan on the other. It was claimed by the former that certain lands granted to them under perpetual leases were exempt from all charges and taxes. Japan asserted her right to levy a tax upon the buildings erected upon these lands. The award of the Court dated the 22nd of May, 1906 was to the effect that all the lands and the buildings erected thereon were free of all taxes, charges, contributions or conditions other than those stipulated in the lease. The case was thus decided in favour of Great Britain, France and Germany.

3. The North Atlantic Coast Fisheries Case[2] **(1910).**—Please see at p. 240.

4. Savarkar's Case[3] **(1911).**—See at p. 425 in Chapter XXIII on 'Extradition'.

5. The Carthage (1612)[4].—*Carthage*, a French mail steamer was stopped on her voyage from Marseilles to Tunis during Turks-Italian war by an Italian destroyer. On an inspection it was found that *Carthage*, had on its board an aeroplane belonging to a French aviator. The aeroplane whs considered to be contraband and the *Carthage* was taken to a port and was detained for about a fortnight. The Court laid down the principle that "the legality of every act which goes beyond a mere search depends upon the existence either of a trade in contraband or of sufficient reasons to believe that such a trade exists, as in this respect the reasons must be of juridical nature." Inasmuch as there existed no juridical reasons to hold that the aeroplane was contraband, the capture of the vessel was held to be unjustified. In the result Italy was asked to pay France 160, 000 Francs as *compensation for the loss suffered* by private parties on account of the capture of the ship.

1. Birkenhead.—International Law (V Ed.) p. 162.
2. Martens N. R. C. 3rd Ser. 4 p. 89.
3. Martens N. R. C. 3rd Series 4 p. 79.
4. Scott—Hague Court Reports 329-334.

CHAPTER XXXVII

PERMANENT COURT OF INTERNATIONAL JUSTICE

Origin.—The Permanent Court of International Justice came into being in 1921, persuant to Article 14 of the Covenant of the League of Nations which called upon the Council to "formulate and submit to the Members of the League for adoption, plans for the establishment of the Permanent Court of International Justice." Such a Court was to have Jurisdiction to hear and determine any dispute of an international character which the States might submit to it and to give advice upon questions that might be referred to it by the Assembly or the Council. The Council appointed a Commission of Justice and the plan for such a Court was prepared. After the approval of this plan by the Council and the Assembly the Statute of the Court was ratified by the member-States. Thus the Permanent Court of International Justice was created and opened on 15th February, 1922.

Nature and composition.—Under the Statute of 1920 the Court consisted of 15 members of whom eleven were Judges and four deputy Judges By an amendment of 1929 the deputy Judges were abolished and the number of ordinary Judges was raised to fifteen. Members of the Court were nominated by the national groups in the older Court of Arbitration organised by the Hague Conventions of 1899 and 1907 and on their nomination the members were elected by the concurrent action of the Council and the Assembly of the League. While the general qualification of the Court as a whole was that it should "represent the main forms of civilization and the principal legal systems of the world", the individual qualifications of the members related to their moral character and juristic ability and had no reference to their nationality. Provision however, was made by the Statute for the appointment by the contesting parties in a particular case of Judges of their own nationality. A quorum of nine Judges constituted the Court. Article 21 of the Statute provided that the Court shall elect its President and vice-Presi dent for a term of three years and shall also appoint its Registrar.

Privileges and Immunities of the Members.—As provided by Article 19 of the Statute "the members of the Court when engaged on the business of the Court shall enjoy diplomatic privileges and immunities."

Improvement on the Permanent Court of Arbitration.—The Permanent Court of International Justice marked a distinct improvement on the Permanent Court of Arbitration. "The so called Permanent Court of Arbitration was nothing but a list of persons out of which the Judges forming a tribunal of arbitration could be chosen."[1] It was neither 'permanent' nor a 'Court'. Nor were its Judges a body of permanent officials. As *Manley O Hudson* says it was hardly more than a 'method and a procedure'.[2] The Permanent Court of International Justice on the other hand was a Permanent Court and was able to develop a continuity of legal outlook like the present International Court of Justice to an extent not possible with arbitral tribunals which are appointed temporarily and *ad hoc* like the Permanent Court of Arbitration. States had no option to select their own Judges from a panel which was allowed in the case of Permanent Court of Arbitration.

Jurisdiction and Functions.—The Court had a two-fold jurisdiction, the general jurisdiction based upon the Statute and special jurisdiction derived from treaties and conventions to which particular States were parties. The general jurisdiction of the Court which was limited to the cases 'which the parties refer to it', was supplemented by an optional compulsory jurisdiction embodied in the so-called "optional clause." The members might accept the optional clause by signing a separate protocol. This jurisdiction covered four classes of '*legal disputes*' concerning :—(1) the interpretation of a treaty, (2) questions of International Law, (3) the existence of facts involving a breach of an international obligation and (4) the nature or extent of the reparation to be made for the breach of an international obligation.

The protocol was accepted by more than twenty States. Great Britain accepted the jurisdiction of the Court in 1927 with some reservations.

Advisory Functions.—Besides its contentious jurisdiction to render decisions which were final and without appeal, the Court might be requested by the Council or the Assembly of the League 'to give an advisory opinion on any legal question.' 'While advisory opinions had no binding force and left the Council or the Assembly free to come to an independent

1. Hans Kelsen—International Law p. 317.
2 Hudson—International Tribunals (1944) p. 8.

decision, as a matter of practice the Council (the only body to request an advisory opinion) appeared to regard the advisory opinion as definitely settling those legal aspects of the dipute submitted to the Court.'[1]

Law applied.—Under Article 38 of the Statute the laws which the Court shall apply will be :—

(1) International Conventions recognized by the Court ;

(2) International Custom ;

(3) General principles of law accepted by civilised States;

(4) Judicial decisions ; and

(5) The teachings of the most highly qualified publicists of various States.

IMPORTANT DECISIONS OF THE COURT

1. The S. S. Wimbledon[2].—(For the facts of the case please see at Page 265.) In this case, the Court while laying dow the law in regard to the passage of ships through the Kiel Canal, observed: "When an artificial waterway connecting the open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to a natural strait, in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State, under whose jurisdiction the waters in question lie."

2. The Lotus case[3].—A collision between the French steamship *Lotus* and a Turkish ship *Boz Kourt* occurred on the open sea. As a result of this collision the Turkish steamship was lost and eight Turkish subjects died. On the arrival of the French steamship 'Lotus', at Constantinople the Turkish Government took criminal proceedings both against the Captain of the Turkish vessel and the French officer of the 'Lotus' both of whom were sentenced to imprisonment. The French Government made a grievance on the ground that Turkey had no jurisdiction inasmuch as the act was committed on the open sea and that it was the flag State which had jurisdiction. Both the States agreed to refer the mat-

1. Fenwick—International Law (Third Ed.) p. 523.
2. (1923) P. C. I. J. Series A, No. 1.
3. S. S. Lotus (1927) P. C. I. J. Series A. No. 10.

ter to the Permanent Court of International Justice. The Court held that Turkey had not acted in conflict with the principles of International Law "because the act committed on board the '*Lotus*' produced its effects on board the *Baz Kourt* under the Turkish flag and therefore on the Turkish territory giving Turkish Court jurisdiction." The Court observed that International Law did not prohibit a State from exercising its jurisdiction over a foreigner for an act done outside its territory and that "the territoriality of criminal .... is not an absolute principle of International Law and by no means coincides with territorial sovereignty."

3. Nationality Decrees in Tunis and Moracco[1].—In this case the Court was requested by the Council of the League to deliver an advisory opinion 'whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Moracco (French zone) on November 8, 1921 and their application to British subjects is or is not by International Law solely a matter of domestic jurisdiction, in which the Council was unable to make any recommendation as to settlement. The Court found that the issue did not concern a matter solely within the domestic jurisdiction of France. It was held that although questions of nationality are in principle essentially within a State's reserved domestic jurisdiction, they pass into the domain of International Law if issues of treaty interpretation are incidentally involved or if a State purports to exercise jurisdiction in matters of nationality in a protectorate. The Court observed that the words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they very closely concern the interests of more than one State, are not in principle regulated by International Law. As regards such matters each State is sole judge.

4. German Settlers in Poland.[2]—In this case the Permanent Court of International Justice was requested by the Council of League to deliver an advisory opinion on the rights of the German Settlers living in Poland on territory which was transferred from Prussia after the First World War. The Court after declaring that 'private rights acquired under existing law do not cease on a change of sovereignty' upheld as against Poland the right of German Settlers. The Court observed :

1. (1923) Series B. No. 4.
2. (1923) P. C. I. J., Ser. B. No. 6.

"... .. .. even those who contest the existence in International Law of a general principle of State succession do not go so far as to maintain that private right including those acquired from the State as the owner of the property are invalid as against a successor in soverignty."

5. **Legal status of Eastern Greenland.**[1]—The Eastern Greenland dispute arose out of the action of Norway in proclaiming the occupation of certain parts of Eastern Greenland. Denmark thereupon acting under the optional clause of the Court's Statute asked the Court to declare the Norwegian Proclamation invalid, on the ground that the area to which it referred was subject to Danish sovereignty which excluded the whole of Greenland. The Court was satisfied on the evidence that at any rate after a certain date, 1721, Denmark's intention to claim title to the whole of Greenland was established But the areas in dispute were outside the settled areas of Greenland, and it was necessary therefore for the Court to examine carefully the evidence by which Denmark tried to satisfy the second necessary element in occupation, namely the exercise of authority. On this they pointed out that the absence of any competing claim by another State and until 1931 no State other than Denmark had ever claimed title to Greenland) is an important consideration ; a relatively slight exercise of authority will suffice when no State can show a superior claim. Giving judgment in favour of Denmark the Court held : "It is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being. Even if the material submitted to the Court might be thought insufficient to establish the existence of that sovereignty during the earlier periods, this would not exclude a finding that it is sufficient to establish a valid title in the period immediately preceding occupation."

CHAPTER XXXVIII

THE CODIFIED LAW OF THE SEA.

Introduction.—The important rules of International Law relating to international water-ways, sea and jurisdiction over ships and vessels sailing on high-seas and the maritime belt have already been discussed. Here it is proposed to

1. (1933) P. C. I. J. Series A/B No. 53.

give a summary of the codified law relating to the sea and to discuss the same. The law of the sea so far codified represents only a part of the great mass of rules of International Law on the subject. The part of the law of the sea that has been codified must now be regarded as well-settled and beyond all controversy and deserves a place in a textbook of International Law. The law herein stated was first carefully scrutinised by the Law Commission of the United Nations and later on approved by the Conference on the Law of the Sea after full discussion.

The Conference on the Law of the Sea (1958) and its Genosis.—The Law Commission of the United Nations having been entrusted with the work of codification of the International Law selected the regime of the high seas as one of the topics for codification in its first session in 1949. A questionnaire was sent to the Governments of all the member States and a special rapporteur was appointed to study the subject. At its second session the Commission considered the report submitted by the rapporteur and took the view that as it could not undertake a codification of the maritime law in all its aspects it was necessary to proceed with its work of codification on selected subjects. A number of subjects which did not appear to be important were set aside for the future and the subjects that were selected were nationality of ships, collision, safety of life at sea, right of approach, slave trade, submarine telegraph cables, resources of the sea, right of pursuit, contiguous zones, sedentary fisheries and the continental shelf. At its third session the Commission prepared a draft code on continental shelf and invited comments. The Commission at its fifth session in the light of comments prepared final draft articles on continental shelf, fishery resources of the high seas and the contiguous zone and recommended that the General Assembly may adopt the draft articles by resolution. The General Assembly did not however consider it proper to adopt the draft articles until all the problems had been studied by the Commission and reported to the Assembly. At its eighth session the Commission proposed to group together systematically in a single report all the rules relating to high-seas, the territorial sea, the continental shelf, contiguous zone, fisheries and the protection of the living resources of the sea.

The Commission then submitted its report to the General Assembly which adopted a Resolution on February 21, 1957. The Resolution stated that the General Assembly decided that, in accordance with the recommendation of the International Law Commission, 'an international conference of pleni-

potentiaries should be convoked to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.'

The Secretary General of the United Nations in pursuance of this Resolution convoked the Conference. The Conference on the Law of the Sea met at Geneva,from February 24 to April 27,1958 and was attended by the representatives of 86 Countries. The General Assembly referred to the Conference the report of the Law Commission and recommended that the Conference should study "the question of free access to the sea of the land-locked countries, as established by international practice or treaties" The Conference was attended by the representatives of many non--member-States, such as the Federal Republic of Germany, Switzerland, Moracco, San Marino and the Holy, the Republic of Korea and Vietnam. All the members of the United Nations with the exception of Ethiopia and Sudan were represented at the Conference.

Although no agreement could be reached on the two principal issues of the breadth of the territorial sea and of exclusive fishery limits, the Conference succeeded in drawing up four Conventions which were signed on April 29, 1958. The four Conventions on the general regime of the High Seas, on High Seas Fishing and Fishery Conservation, on the general regime of the Territorial Sea and Contiguous Zone and on the Continental Shelf comprise a major portion of the existing rules of International Law of the Sea and also some new rules on the subject approved by the attending States. The adoption of the four Conventions marks the achievement of the Conference which succeeded in bringing about the first codification by international agreement of an important portion of the law of peace. The Conference succeeded in a matter in which the Hague Conference of 1930 had failed. The failure of the Conference of 1930 was due to the disagreement of the nations on the question of the breadth of the territorial sea. The Conference of 1958 avoided the mistake which the Hague Codification Conference of 1930 had committed. It did not feel deterred from codifying the law on other matters by the disagreement of nations on the question of the breadth of the territorial sea and it thus succeeded in arriving at the four Conventions.

The four Conventions adopted by the Conference are based on the report of the International Law Commission and mark a landmark in the history of codification of International Law.

Each of these four Conventions constitutes a general code of law on the subject dealt with by it. Besides these Conventions the Conference adopted a number of resolutions on subjects such as nuclear tests, pollution of the high seas by radio-active materials, conservation conventions, coastal fisheries, and historic waters were adopted. The discussions at Conference lasting for about nine weeks resulted in a great achievement.

1. CONVENTION ON THE CONTINENTAL SHELF

This was adopted at Geneva on April 26, 1958 by the United Nations Conference on the Law of the Sea It constitutes an act of international legislation determining the scope of the continental shelf and the rules governing it. It was approved by an over-whelming majority vote of 57 to three. The rules contained in the Convention will be binding on the parties after it has been ratified by twenty-two States. This Convention as the other three, is open for accession by States and is subject to ratification. The rules regarding the continental shelf are contained in 15 articles of the Convention and may be stated thus :

(*a*) **Continental Shelf—defined**.—Article 1 of the Convention defines 'continental shelf' as a term referring "(*a*) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admit of the exploitation of the natural resources of the said areas ; (*b*) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands."

This definition is based on the draft prepared by the International Law Commission in 1956.

(*b*) **Rights of the Coastal State**.—Article 2 of the Convention declares the sovereignty of the Coastal State over the continental shelf. The Coastal State has the exclusive right of exploring and exploiting the natural resources of the continental shelf. No State other than the Coastal State has such a right. A State other than the Coastal State can explore and exploit the natural resoures of the continental shelf with the express consent of the Coastal State. These exclusive sovereign rights of the Coastal State over the continental shelf do not depend on occupation, effective or notional or on any express proclamation.

> The natural resources of the continental shelf consist of "the mineral or other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." The living organism of the seabed and subsoil of the sedentary species consist in coral, sponges, oysters, including pearl-oysters, pearl shell, the sacred chank of India and Ceylon, the trochus and plants.

It will be thus noticed that the Coastal State alone has the power to explore and exploit the mineral resources of the seabed and subsoil of that portion of the high sea which has been defined as the continental shelf. The rights of exploration and exploitation of the mineral resources of the continental shelf inhering in the Coastal State are however subject to restrictions imposed by Articles 3, 4 and 5. It has been provided by Article 3 that the legal status of the superjacent waters as high seas or that of the air-space above those waters will remain unaffected by the rights of the Coastal State of exploration and exploitation of the mineral resources of the seabed and subsoil of the continental shelf. In other words, the position of the continental shelf as a part of the high seas in relation to all the nations will remain as it is. The Coastal State cannot as provided by Article 4, impede the laying or maintenance of submarine cables or pipelines on the continental shelf. The freedom of navigation or of fishing on continental shelf which is but a part of the open sea is not affected by the rights of the Coastal State. Similarly, the air-space on the continental shelf remains free and open.

Article 5 of the Covenant defines more specifically the rights and duties of the Coastal State *vis-a-vis* other users of the high sea. A Coastal State has to carry out its operations of exploring and exploiting the mineral resources of the seabed and subsoil of the continental shelf in such a way as may not in any manner cause "unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea or with fundamental oceanographic or other scientific research carried out with the intention of open publication." It will be open to the Coastal State to construct and maintain or operate installations or other devices on the continental shelf for the exploration and exploitation of the mineral resources and to establish safety zones around such installations

or devices and to take necessary measures for the protection of the safety zones. The safety zone can be permitted to extend to a distance of 500 metres around the installations and other devices measured from each point of their outer edge The ships of all nationalities are under an obligation to respect these safety zones. The installations or devices erected by the Coastal State will not be regarded as islands, though they will be under the jurisdiction of the Coastal State. The presence of such installations and devices will not affect the delimitation of the territorial sea of the Coastal State. The Coastal State has to remove disused or abandoned installations and other devices. It has a duty to give due notice of the erection of the installations and other devices and to keep permanent means for giving warning of the presence of such installations or other devices. The Coastal State must take care not to establish installations or other devices at places where interference may be caused to international navigation. The Coastal State is obliged to undertake, in the Safety Zones, all appropriate measures for the protection of the living resources of the sea from harmful agents. A research concerning the continental shelf can be carried on with the consent of the Coastal State.

The Coastal State has got the right of exploiting the subsoil of the continental shelf by means of tunnelling irrespective of the depth of water above the subsoil.

(*c*) **Boundary line in Continental Shelf**—The Covenant in its sixth Article provides for the solution of the boundary disputes between two or more States relating to the continental shelf. Article 6 of the Convention provides that in cases where the continental shelf is adjacent to the territories of two or more States, the boundary of the continental shelf may be determined by agreement. If the States concerned fail to arrive at an agreement the boundary is the median line every point of which is equidistant from the nearest points of the base-lines from which the breadth of the territorial sea of each State is measured. If the continental shelf is adjacent to the territories of two adjacent States the boundary is to be determined by application of the principle of equidistance from the nearest points of the base-lines from which the breadth of the territorial sea of each State is measured. The boundary lines thus determined are to be defined with reference to charts and geographical

features existing on a particular date and reference should be made to fixed permanent identifiable points on the land.

(*d*) **Date of coming into force of the Convention** — This Convention is expressed to come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations. It will enter into force for States ratifying or acceding after the twenty-second ratification, on the thirtieth day after deposit by such State of its instrument of ratification or accession

(*e*) **Reservations and withdrawals.**—The Convention permits the States to make reservations at the time of signing, ratifying, or aceding to the articles of the Convention other than articles 1 to 3 inclusive—A State making reservations in the prescribed manner may withdraw the reservations by addressing a communication to that effect to the Secretary-General of the United Nations.

Revision of the Convention.—The Convention also provides for its revision. A contracting party may make a request for the revision of the Convention after 5 years of its entering into force by addressing a communication to that effect to the Secretary-General of the United Nations The General Assembly will take such steps for the purpose of revising the Convention as it may deem proper.

2. CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE.

(*a*) **Sovereignty of Coastal State.**—The Coastal State exercises sovereignty over territorial sea which may be described as a belt of sea adjacent to its coast but beyond its land territory and its internal waters. The sovereignty of the coastal State extends to the air-space over the territorial sea as well as to its bed and subsoil.

(*b*) **Limits of the Territorial Sea.**—The Convention does not prescribe the breadth of the territorial sea. The Conference failed to bring about agreement on this point. The States represented at the Conference claimed different breadths. A majority of States claimed territorial waters of three miles breadth. The claims of other States ranged between 4 to 200 miles breadth. The Conference ignored this disagreement

and proceeded to lay down the limits of the territorial waters and the method by which the unascertained breadth of the territorial waters was to be measured.

Articles 3, 4, 5 and 6 define the limits of the territorial sea. The normal base line for measuring the breadth is the low-water line along the coast as marked on large-scale charts officially recognised by the Coastal State. If the coastline is deeply indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity a straight base line joining appropriate points may be drawn to measure the breadth. The straight baseline would follow the general direction of the coast. The baselines are not to be drawn to and from low-side elevations, unless light houses or other permanent installations have been built on them above sea level. The straight base line method is not to be applied if its application will cut off from the high sea the territorial waters of another State. Waters on the landward side of the baseline would form part of the internal waters of the State. A right of innocent passage is allowed in such internal water areas as may be found enclosed on the establishment of a straight baseline and as were previously regarded as part of the territorial waters of the high sea.

The outer limit of the territorial sea has been fixed at the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

(*c*) **Bays.**—Article 7 of the Covenant defines a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitutes more than a mere curvature of the coast," provided that an indentation shall not be regarded as a bay unless its area is as large as or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation. If the indentation has because of the presence of islands, more than one mouth, the semi-circle is to be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.

The area of an indentation is to be obtained by measuring the distance lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 miles, the bay would constitute internal

waters. In case this distance is more than twentyfour miles, a straight baseline of twentyfour miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

(*d*) **Right of innocent passage.** (*i*) All States have a right of innocent passage through the territorial sea. The word 'passage' has been defined to mean 'navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters or of making for the high seas from internal waters.' In exercise of the right of innocent passage a ship is permitted to stop and anchor in territorial waters if necessary during ordinary navigation or if it becomes necessary by being in distress or by force *majeure*. The passage of a ship is innocent if it does not disturb the peace, good order or the security of the Coastal State. The fishing vessels exercising the right of innocent passage are bound to observe such laws and regulations as may be prescribed by the Government of the Coastal State. Submarines have to navigate on the surface and to show their flag. Foreign ships exercising the right of passage have to comply with the laws and regulations of the Coastal State and to behave in conformity with the rules of International Law.

(*ii*) **Rights and Duties of the Coastal State.**—The Coastal State is under an obligation not to hamper innocent passage through the territorial sea and to give appropriate publicity to any danger to navigation of which it has knowledge within its territorial waters.

The Coastal State has the right of preventing passage that is not innocent. It can take steps to enforce conditions of admission when a ship proceeds to its internal waters. It has the right of suspending temporarily without discrimination the innocent passage of foreign ships in case such suspension is necessary for its security. The Coastal State has to give due publicity of its intention to suspend innocent passage. It will have however no right to suspend innocent passage of foreign ships through straits which are used for international navigation between one part of the high sea and another part of the high sea or the territorial sea of a foreign State.

(*e*) **Charges.**—The Coastal State will not charge anything for the innocent passage of a foreign ship through its territorial waters. It can however levy a charge for specific services rendered to the ship. No discrimination in the levy of such charges is however permissible. These rules apply to private

as well as Government ships operated for non-commercial purposes.

(*f*) **Criminal jurisdiction of the Coastal State in respect of merchant ships and Government ships.**—The Coastal State cannot exercise its criminal jurisdiction on board a foreign ship passing through its territorial waters to arrest any person or to conduct any investigation in relation to a crime committed on board the ship. Such jurisdiction is to be exercised in the following cases :—

"(*a*) if the consequences of the crime extend to the coastal State ; or

(*b*) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea ; or

(*c*) if the assistance of the local authorities has been requested by the Captain of the ship or by the Consul of the Country whose flag the ship flies ; or

(*d*) if it is necessary for the suppression of illicit traffic in narcotic drugs."

In exercising such jurisdiction the Coastal State shall, if the Captain so requests, advise the consular authority of the flag State before taking any steps and shall facilitate contact between such authority and the ship's crew. In emergency this information may be sent while measures are being taken.

A Coastal State can exercise criminal jurisdiction if authorised by its laws to arrest or make investigation on board a foreign ship passing through the territorial sea after leaving internal waters. The local authority in making arrests shall have due regard to the interests of navigation. The coastal State has no right either to make arrest or investigation on board a foreign ship passing through its territorial waters in connection with a crime which had taken place before the ship entered the territorial sea, if the ship coming from a foreign port passes through the territorial waters without entering internal waters.

(*f*) **Civil jurisdiction of Coastal State in repect of merchant ships and Government ships.**—The coastal State has no right to stop or divert a foreign ship passing through its territorial waters for the purpose of exercising civil jurisdiction in relation to any person on board the ship. It will however be open to a coastal State in accordance with its laws to levy execution against or arrest, for the purpose of any civil proceeding, a foreign ship lying in or passing through the territorial waters after leaving internal waters. The Coastal State cannot

however, levy execution against or arrest the ship for the purpose of any civil proceeding except in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the Coastal State.

(*h*) **Warship.**—A Coastal State has the right of asking a warship to leave its territorial waters, in case it does not comply with the regulations concerning passage through the territorial sea and disregards any request for compliance with those regulations.

(*i*) **Contiguous Zone.**—A zone of the high seas contiguous to the territorial sea and not-extending beyond twelve miles from the baseline from which the breadth of the territorial sea is measured is called the 'contiguous zone.'

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, in case they do not come to an agreement, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of the two States is measured.

The Coastal State is entitled to exercise control over the contiguous zone for the purpose of preventing infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea or for punishing infringement of such regulations committed within its territory or territorial waters.

3. CONVENTION ON THE HIGH SEAS

The Convention defines 'high seas' to mean 'all parts of the sea that are not included in the territorial sea or in the internal waters of a State.' The high seas are not subject to the sovereignty of any State.

(*a*) **Freedoms.**—Every State enjoys four freedoms on the high seas. These are :

(*i*) freedom of navigation ;

(*ii*) freedom of fishing ;

(*iii*) freedom to lay submarine cables and pipelines ;

(*iv*) freedom to fly over the high seas.

These freedoms are to be exercised by a State with reasonable regard to the interests of other States in their exercise of the freedom of the high seas. Every State has the right

to sail ships under its flag on the high seas. Not only coastal States but States having no sea coast are to have free access to the sea. It is provided for in Article 3 of the Convention that States having no sea-coast and coastal States would by mutual agreement and in conformity with existing international conventions permit the States having no sea coast, on a basis of reciprocity, free transit through their territory and allow ships flying the flag of that State treatment equal to that accorded to their own ships or to the ships of any other State as regards access to sea ports and the use of such ports. This Article also requires States situated between the sea and a State having no sea-coast to arrive at a mutual agreement, taking account of the rights of the coastal States and the special conditions of the State having no sea coast, in respect of all matters relating to freedom of transit and equal treatment in ports, in case there is no existing international convention in force.

(*b*) **State Regulations.**—The Convention requires every State to fix conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. The ships will have the nationality of the State whose flag they are entitled to fly, and that State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Every State is required to issue necessary documents to ships to which it grants the right to fly its flag. A ship shall sail under the flag of one State only and save in exceptional cases expressly provided for in international treaties shall be subject to its exclusive jurisdiction on the high seas. No ship will be allowed to change its flag during its voyage or while it is in a port of call save in the case of a real transfer of ownership or change in registry. A ship which sales under the flags of two or more States is not entitled to claim nationality of any State and is one without any nationality. Ships employed on official service of an inter-governmental organization is entitled to fly the flag of the organization. War-ships on high seas will enjoy complete immunity from the jurisdiction of any State other than the flag State.

(*c*) **Warships and Government ships**.—A warship has been defined as belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality under the command of an officer duly commissioned by the Government and whose name appears in the Navy List and manned by a crew who are under regular Naval

discipline. Ships owned or operated by a State and used only on Government non-commercial service are entitled to enjoy the same immunity on the high seas as the warships.

(*d*) **Prevention of Collisions at Sea and State assistance.**—Every State will have a right to take such measures as are necessary to ensure safety at sea with regard to the use of signals, the maintenance of communications, the prevention of collisions, the maintaining of ships and labour conditions for crews, taking into account the applicable international labour instruments, and the construction, equipment and seaworthiness of ships.

In cases of collision or any other incident of navigation concerning a ship on the high seas where the Master or any other person in the service of the ship is to be punished or is to be dealt with, the proceedings are to be instituted before judicial or administrative authorities either of the flag State or of the State of which such person is a national. The State issuing the Master's certificate or the certificate of competence or licence shall alone be competent to pass an order of withdrawal of such certificates even though the holder of such certificate is not a national of the State which issued them.

Assistance in danger at sea.—Every State will issue instructions to the Master of the ship sailing under its flag in so far as he can do so without serious danger to his ship, the crew or the passengers :—

(*a*) Render assistance to any person found at sea in danger of being lost.

(*b*) To proceed with all possible speed to the rescue of persons in danger if assistance is needed.

(*c*) To render assistance to the other ship, her crew and her passengers after a collision and where possible to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

Every State is required to promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea through mutual regional arrangements.

(*e*) **Slave Trade.**—Every State is to adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and also to prevent the unlawful use of its flag for that purpose. A slave on board a ship shall *ipso facto* be free.

(*f*) **Piracy.**—There is an obligation on all the States to co-operate to fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Piracy has been defined to consist in the following acts :—

(*a*) Any illegal acts of violance, detention or any act of degradation committed for private ends by the crew or the passengers of a private ship or a private air craft and directed on high seas against another ship, air craft or against persons or property on board of such ships and air craft or against a ship, air craft, persons or property in a place outside the jurisdiction of any State.

(*b*) Any act of voluntary participation in the operation of a ship or of any air craft with knowledge of facts making it a pirate ship or air craft.

(*c*) Any act of inciting or of intentional by facilitating the above acts.

A ship or aircraft will not lose its nationality in case it has become a pirate ship or air craft. Every State is entitled to seize a pirate ship or air craft or a ship taken by piracy and under the control of pirates and assist the persons and seize the property on board. This seizure can only be effected on the high seas or in any other place outside the jurisdiction of any State. The Courts of the State which had seized will have jurisdiction to decide upon the penalties to be imposed and the action to be taken with regard to the ships, air craft or property subject to the rights of third parties acting in good faith. A State seizing a ship or air craft on suspicion of piracy will be liable to the State whose flag the ship or air craft is flying for any loss or damage caused by the seizure in case it transpires that the seizure was without adequate grounds. The seizure will be effected only by war-ships or military air-crafts or other ships or air crafts on Government service and authorized to that effect.

(*g*) **Right of Visit**.—A war-ship encountering a foreign merchant-ship on the high seas will not be justified in boarding her unless there are reasonable grounds for suspecting that the ship is engaged in piracy or in the slave trade or that flying a foreign flag or refusing to show its flag the ship is not really of the same nationality as the war ship. In case the suspicion proves to be unfounded and provided that the ship pirated has not committed any act justifying them it shall be compensated for any loss or damage that might have been caused.

(*h*) **Hot pursuit**.—The coastal State having good reasons to believe that a foreign ship has violated its laws and regulations is entitled to undertake a hot pursuit of that ship. The hot pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the coastal State and it can only be continued outside the territorial sea or the contiguous zone if the pursuit has been interrupted. If the foreign ship is within the contiguous zone the hot pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established. The right of the hot pursuit will cease as soon as the ship pursued enters the territorial waters of its own country or of a third State. The pursuit will only be commenced after a visual or auditory signal to stop has been given at a distance from which the pursued ship is able to see or hear. The right of hot pursuit is to be exercised only by war-ships or military air-crafts or other Government ships or air-crafts authorized for that purpose. This right of hot pursuit of ships is also available in respect of the air-craft. When a ship has been stopped or arrested on the high seas in the circumstances which do not justify the exercise of the right of hot pursuit it shall be compensated for any loss and damage that might have been caused to it.

(*i*) **Pollution of the seas.**—Every State will make regulations to prevent the pollution of the seas by discharge of oils from ships or pipe lines or resulting from the exploitation and exploration of the sea-bed or its subsoil with due regard to the existing treaty provisions on the subject. All States have to take measures to prevent pollution of the seas from the dumping of radio active wastes taking into account any standards or regulations which may have been formulated by competent international organisations.

4. CONVENTION ON FISHING AND CONSERVATION OF LIVING RESOURCES ON HIGH SEAS.

The conservation of living resources on the high seas, defined—

This expression has been defined to mean "the aggregate of the measures rendering possible optimum sustainable yield from those resources so as to secure a maximum supply of food or other marine products."

(*a*) **Rights and duties of Coastal States.**—Every coastal State is entitled to take part on equal footing in any system

of research and regulation for purposes of conservation of the living resources of the high seas in that area even though its nationals do not carry on fishing there. Every State has a right for their nationals to engage in fishing on the high seas. Adjacent coastal States interested in fishing in the high seas are required to enter into mutual agreements prescribing measures necessary for the conservation of the living resources of the high seas in that area. In case the coastal States fail to reach an agreement the matter is to be submitted to a special commission of five members as required under Article 9 of the Convention.

Any coastal State may with a view to the maintenance of the productivity of living resources adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area or the high seas adjacent to its territorial sea provided that negotiations to that effect with other States concerned have not led to an agreement within six months.

(*b*) **Settlement of disputes.**—The Convention has provided for a machinery for the settlement of disputes arising between States under its Articles 4, 5, 6, 7 and 8. At the request of any of the parties the dispute is submitted to a Special Commission of five members in case the parties agree to have the matter settled by peaceful means as provided for in Article 33 of the Charter of the United Nations. Members of the Special Commission shall be named by agreement between the States in dispute within three months of the request for settlement. In case the States in dispute fail to agree upon the names of the members of the Commission the appointment will be made by the Secretary General of the United Nations in consultation with the States in dispute and with the President of the International Court of Justice and the Director General of the Food and Agriculture Organization of the United Nations from amongst well qualified persons being nationals of States not involved in the dispute. The State party to the dispute will have a right to name one of its nationals to the Special Commission with right to participate fully in the proceedings on the same footing as a member of the Commission but without a right to vote or to take part in the decision. The Commission is to determine its own procedure and shall give full opportunity to the parties to be heard and present their case. The decision of the Commission will be by majority vote. Article 10 of the Convention enumerates criteria which are to be applied by the Special Commission in dispute arising under Articles 4, 5, 6 and 8. The decision of the Special Commission

will be binding on the States concerned and the provisions of paragraph 2 of Article 94 of the Charter of the United Nations shall be applicable to those decisions.

CHAPTER XXXIX

DISARMAMENT

General.—The idea behind all schemes of disarmament is that States go to war when they are possessed of arms and in order that there may be no wars the States are to be disarmed. The belief that disarmament ensures peace is not ill-founded. The recurrence of horrible wars can be prevented by disarming nations and by reducing their strength in war weapons. A State which does not possess instruments of warfare in adequate measure can hardly think of war with another State having large quantities of arms and ammunition. Disarmament represents a scheme for ensuring peace and it has for many centuries been supported by seekers after peace It, however, never met with success and could not find favour with nations. Evety great war was followed by efforts to make disarmament successful but with no good result. Although nations believe in the efficacy of disarmament in the interest of international peace and security, they find it impossible to agree to any measure which has the effect of reducing their military strength. The First Great War ended and a new armament race began soon after to alarm the war-torn world. Disarmament plans began to be chalked out and conferences were summoned to prevent race for armament. These efforts met with no good success and while they continued the Nazi revolution of 1933 gave a rude awakening to a world which had been lulled to sleep by talks of disarmament and peace. The Second World War soon after broke out with an unprecedented fury. The events of this war exposed the hollowness of the negotiations for disarmament and the futility of the Disarmament Conferences. The end of the Second World War marked the commencement of negotiations for disarmament. Hectic efforts are going on to bring about disarmament and to control States in their production of nuclear energy.

Disarmament as a scheme does not aim at abolishing armaments but at reducing them to such an extent as

may, while being just sufficient for national safty, not be a source of international disorder. A disarmament scheme contemplates that States may possess armaments only for the purposes of safety of their territories and for discharging their international obligations. It prevents the States from having armaments in excess of their national needs.

Disarmament after First World War.—The Treaty of Versailles worked out complete disarmament of Germany but did not prevent the other powers from starting a new race of armament The Covenant of the League of Nations recognised that the maintenance of peace required the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations. Article 8 of the Covenant imposed upon the Council a responsibility of formulating plans, after taking into account the geographical situation and circumstances of each State, plans for reduction of armament for the consideration and action of the several Governments. The Council was required to advise the members of the League how the evil effects attendant upon manufacture of munitions and implements of war can be prevented, keeping in view the necessities of those members of the League which were not able to manufacture such commodities necessary for their safety. The members of the League undertook 'to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes, and the condition of such of their industries as are adaptable to warlike purposes.'

The League of Nations in pursuance of the provisions of Article 8 and 9 the Covenant set up in 1920 a Permanent Advisory Armaments Committee consisting of military, naval and air experts for the purpose of tendering expert opinion on the questions arising out of the disarmament programme The Assembly also decided to establish a Temporary Mixed Commission for formulating plans for the limitation of armaments. The Council of the League in 1925 set up a Preparatory Committee for holding the Disarmament Conference. The representatives of Governments were invited to this Conference which met on February 5, 1932. The United States of America and the Soviet Russia as well as some other non-member States participated in the conference. The meeting of the conference coincided with the Japanese attack on Manchuria. Hundreds of proposals were brought by the delegates to the Conference but with no good results. The Conference was a great failure. The Nazi

revolution in Germany and the Japanese attack on Manchuria created a poisonous atmosphere for the Conference. Germany flared up at the British Statement which was submitted to the Bureau of the Conference in 1933 and which suggested that Germany was to remain disarmed for another four years and that other heavily armed Powers would begin disarming themselves after the expiry of the four years. Germany announced her withdrawal from the League of Nations as well as from the Conference. The conference broke down and the disarmament proposals ended in a failure. In 1935 Germany repudiated Part V of the Treaty of Versailles and started military conscription. It also denounced the Locarno Pact and started rearmament rigorously. The League thus failed to make its disarmament plan a success.

At the same time when the League started its disarmament work, efforts were being made by the Great Powers to arrest the progress of the race for armament which had then begun. The United States of America took the lead and invited Britain, Japan, France and Italy to a Conference to be held at Washington. This Conference met on November 12, 1921 and was also attended by China, the Netherlands, Belgium and Portugal. The Five-Power Treaty Limiting Naval Armament was signed on February 6, 1922 Japan, Italy, the United States of America, Britain and France agreed to a mathematical principle for reducing their battleships, battle cruisers and air crafts. No agreement was however reached in respect of other types of vessels. In 1927 another Conference was held to arrive at some agreement with regard to vessels not covered by the Treaty of 1922. France and Italy refused to participate. The United States of America, Japan and Great Britain met but could not come to any agreement and the Conference failed to achieve its object Three years later in 1930 the London Naval Conference met and succeeded in bringing into existence the London Naval Treaty which was signed on April 22, 1930 and by which the United States of America, Great Britain, France, Italy and Japan agreed to limit further their Naval armaments.

Germeny in its note dated June 18, 1935 expressed her willingness to limit her navy in relation to the aggregate naval strength of the members of the British Commonwealth of Nations to a proportion of 35 : 100. This limitation did not apply to German submarines. In 1939 a few months before going to war Germany denonnced this arrangement.

The United States of America, France and Great Britain concluded on March 25 1936 another Treaty whereby they

agreed to limit the number of certain types of ships and to notify to each of them in advance their programme of acquisition and construction of all vessels of naval categories. In 1937 Great Britain entered into similar arrangement with Russia and Germany by means of separate treaties. The suspension of these agreements was declared by Great Britain on the outbreak of the Second World War. This war between fully armed nations proved that while nations were discussing disarmament plans, they were in reality rearming themselves and preparing for the war.

Disarmament under the United Nations.—The futile activities relating to disarmament which had remained suspended during the Second World War were resumed soon after the close of that war. The disarmament plan began as before with the disarmament of the vanquished. Like the League, the United Nations in pursuance of the provisions of Article 22 of the Charter started the work of disarmament

The General Assembly on December 14, 1946 adopted a resolution in which it recognised the necessity of an early regulation and reduction of armaments and armed forces and made recommendations to the Security Council to formulate practical plans for inclusion in international agreements. It further recommended the withdrawal of troops from ex-enemy territories. The Security Council on February 18, 1947 decided to set up the Commission for Conventional Armaments with instructions to prepare proposals with regard to regulation and reduction of armaments and armed forces. The Atomic Energy Commission which had been set up earlier was also busy in tackling up the problems relating to regulation and control of production and use of nuclear energy. The Commission for Conventional Armaments after deciding that it was not concerned with matters connected with nuclear and allied weapons adopted on July 26, 1948 a resolution laying down the following principles : (a) that a system for the regulation and reduction of armaments must be agreed to by all the States and initially by all States having substantial military resources; (b) that the success of the system of disarmament depended on an atmosphere of international confidence and security ; (c) armaments and armed force should be limited to those indispensable to the maintenance of international peace and security ; (d) adequate safeguards were necessary to the success of the scheme for disarmament ; and (e) it was necessary to provide for enforcement action in cases of violation of the terms of arrangements regarding disarmament. The General Assembly on November 19, 1948 adopted a resolution recom-

mended by the Working Committee of the Commission for Conventional Armaments. The Security Council considered this resolution in February, 1949 and asked the Commission to continue its work as suggested by its Working Committee. The Commission adopted the French plan for census and verification of the armed forces and conventional armaments of the member-States of the United Nations. The Security Council however rejected this plan on the negative vote of the Soviet Russia. The General Assembly on December 5, 1949 approved the census plan of the Commission and it recommended that the Security Council despite the lack of unanimity of its permanent members, should continue its study of the regulation and reduction of armaments through the agency of the Commission. At the fifth session of the General Assembly the proposal for co-ordinating the work of the Atomic Energy Commission and the Commission for Conventional Armaments was adopted and as a result of it a Committee of Twelve was set up to consider and report to the sixth session about the ways and means whereby the work of the two Commissions be co-ordinated. This Committee recommended the establishment of a new Commission to carry on the work hitherto being done by the two Commissions.

The General Assembly in 1952 session decided to set up a Disarmament Commission under the Security Council to prepare proposals to be embodied in treaties for the regulation, limitation and balanced reduction of all armaments and armed forces and for the effective international control of the atomic energy on certain specified guiding principles. The Commission received a number of proposals from member-States and after fully considering them it submitted its report to the General Assembly. At its eighth session the General Assembly considered a fourteen-Power proposal. The Soviet Russia proposed certain amendments to the fourteen-Power proposal. On November 28, 1953 the General Assembly adopted the fourteen-Power proposal for an early agreement on a comprehensive and coordinated plan under international control for the regulation and reduction of armaments and armed forces and for elimination and prohibition of atomic, hydrogen, bacterial, chemical and all such other weapons of war and destruction. The Disarmament Commission proceeded to work on this proposal and in 1954 established a Sub-Committee consisting of Canada, France, Soviet Russia, the United Kingdom and the United States of America. The Sub-Committee received proposals from States including the United Kingdom and the Soviet Russia. It considered these proposals and submitted

its report to the Commission which also prepared its report. The Commission submitted its report along with the report of the Sub-Committee to the General Assembly.

The Soviet Russia presented a memorandum at the ninth session of the General Assembly when the report of the Disarmament Commission came for consideration. Its proposals in brief were to the effect that the members of the Sub-Committee should regard themselves to be prohibited from the use of nuclear weapons except in defence against aggression; that a disarmament treaty should be concluded at a conference to be convened for this purpose, an international control organ should be established and that effective measures be taken to eliminate nuclear weapons. On March 18, 1955 Canada, France, the United Kingdom and the United States of America submitted a joint draft resolution to the Sub-Committee. They also proposed basic principles on the question of reduction of arms and armed forces. At the close of elaborate discussions the Soviet Russia on May 10, 1955 submitted a very detailed proposal consisting of three parts.

A Summit Conference of four Heads of Governments (France, the Soviet Russia, the United Kingdom and the United States of America) met at Geneva and each of these Governments expressed their opinions on the questions of disarmament. The Conference ended on July 23, 1955 and the opinions given therein were forwarded to the Sub-Committee which considered them along with other proposals. The report of the Sub-Committee was considered by the General Assembly at its tenth session. The Soviet Russia submitted a proposal entitled "Measures for the further relaxation of international tension and development of international cooperation." The General Assembly asked the States represented on the Sub-Committee to continue their efforts to reach agreement on a comprehensive disarmament plan and should as an initial step give priority to early agreement on and implementation of such confidence-building measures as President Eisenhower's plan for exchanging military blueprints and mutual aerial inspection and Marshal Bulganin's plan for establishing control posts at strategic centres. It was at the 'Summit Conference' that Eisenhower in July, 1955 gave a plan for the exchange of blueprints of military bases and for reciprocal aerial exchanges, and Bulganin proposed an exchange of guarantees between the signatories of NATO and the Warsaw Pact.

The year 1957 saw more serious talks on disarmament. The Sub-Committee met in March, 1957 and the United States

special representative submitted an elaborate proposal emphasizing international supervision of future production of fissionable matetials and a fool-proof internattional control of inter-continental missiles and man-made earth satellites. The Soviet Russia stressed the need of two or three year ban on atomic testing under an international control system. In September, 1957 the western proposal was rejected by the Soviet Russia. From the various discussions that took place it was apparent that while the Soviet Russia wanted to disarm the west, the western objective was to disarm the Soviet Russia by means of the fool-proof inspection schemes.

Rapacki Plan.—In October, 1957 the Polish Foreign Minister, Adam Rapacki announced his proposal for abolition of atomic weapons and establishment of European Zone free of nuclear arms. This was supported by the Soviet Russia but was rejected by the United States of America. In November, 1957 the Soviet Russia declared her intention not to participate further in the proceedings of the Disarmament Commission or its Sub-Committee. By the close of the year 1957 it appeared to be generally agreed that suspension of nuclear tests should be subject to international inspection, that the number of armed forces of big powers should be reduced, that both aerial and ground inspection was necessary and that a list of conventional arms for keeping them into internationally supervised depots be drawn up. The points of difference were many and varied and the problem stood unsolved. The launching of earth satellite by Soviet Russia on October 4, 1957 had the effect of arresting the progress of the negotiations in respect of disarmament.

The Polish Plan was presented before the General Assembly early in 1958. It was objected to on many grounds. The Plan was revised in November 1958 in the light of the objections. The Soviet Russia announced in March 1958 its intention to suspend atomic and hydrogen weapon tests but in October she resumed the tests.

The Polish Plan (Rapacki Plan)—The disarmament Plan proposed by the Polish Foreign Minister, Mr. Rapacki has of late come in for a number of comments and it is necessary to note the broad principles embodied in it. The Plan proposes the establishment of a de-nuclearized zone for improving the international situation needed to faciliiate negotiations on disarmament. The de-nuclearized zone is to comprise of the territories of Poland, Czechoslovakia, the German Democratic Republic and the Federal Republic of Germany. It prohibited

the production or storage of nuclear weapons in this zone. The use of nuclear weapons against this zone was similarly prohibited.

The Plan imposes upon the States of this free zone, the obligation to desist from producing, stocking or importing for their own use or allowing the location on their territories of any types of nuclear weapons, installing or allowing installation on their territories equipment or plant for delivering nuclear weapons. It also requires France, the United States of America, the United Kingdom and the Soviet Russia to undertake not to send nuclear weapons with their troops on the territories of the free-zone, not to instal plant for delivery of nuclear weapons including missile launching equipment, and not to provide the Governments of the States of this zone nuclear weapons or any equipment for the delivery of such weapns. The powers in possession of nuclear weapons are required not to use them against the territories of the free-zone or any target within it.

The Plan proposed the establishment of a control organ to supervise the working of the plan and to prevent the violation of the various commitments. It also laid down principles on which the agreements with nations are to be concluded.

Certain changes were introduced and this Plan was revised. The revised Plan provided for implemention in two stages. In the first stage, it was proposed that the States of the zone should be totally prohibited from producing or using nuclear weapons or from installing plant for the delivery of such weapons and certain measures of control be introduced. The second stage is to be reached after an agreement for reduction of the conventional forces has been aimed at.

Geneva Conference on Detection of Nuclear weapon Tests.—At the proposal of the President of the United States of America a Conference of experts was held on July 1, 1958 Experts of the United States of America, Britain, France, Canada, Soviet Russia, Poland Czechoslovakia and Romania attended the Conference and prepared a report which was published on August 30, 1958. The experts in their report recommended that an international control organ be established to ensure control in accordance with certain technical requirments. They laid down a number of principles to be followed in making the system of control effective. This report proposed a net work of control post and a system of air sampling.

Geneva Conference on suspension of Nuclear Tests.—A Conference of experts of Britain, Soviet Russia and the United States of America met on October 31, 1958 to consider the question of suspension of nuclear tests. The three countries agreed upon the terms of a treaty to be arrived at among them for ending nuclear tests and cooperating in an effective control system. They agreed on the establishment of an international control organization and about the constitution of such organization. They failed to agree on matters concerning the voting system in the Control Commission, the manning of control posts and the inspection teams.

Peaceful uses of Outer Space.—In November 1958 a resolution was proposed jointly by twenty nations on the peaceful uses of outer space before the General Assembly. The resolution provided for the establishment of an Eighteen nation United Nations Committee on the uses of outer space. Russia objected to the establishment of the proposed Committee. After long discussion the resolution was adopted. The resolution required the establishment of an United Nations Committee for making a report to the General Assembly at its 14th sesssion on the activities and resources of the United Nations and its specialized agencies relating to the peaceful uses of outer space, the extent of international cooperation in the programme relating to peaceful use of outer space if undertaken under the auspices of the United Nations ; and on the legal problems arising out of the programmes relating to peaceful uses of outer space. On revision the resolution provided for the establishment of an *Ad Hoc* Committee on the uses of outer space consisting of the representatives of Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Italy, Japan, Mexico, Persia, Poland, Sweden, the United Arab Republic, the United Kingdom, the Soviet Russia and the United States of America. The proposed Committee was to report on a number of matters. The revised resolution was adopted by the General Assembly. The resolution aimed at an agreement to the effect that the outer space should be used for peaceful purposes only and at promoting cooperation for exploration and exploitation of outer space for the benefit of mankind.

Russian Plan for General and complete disarmament.—The Soviet Government after thoroughly assessing the international situation came to the conclusion that the surest way to practical solution of the disarmament problem is the way of general and complete disarmament of all States. The essence of the Soviet proposal is "that over a period of

four years all States should effect complete disarmament and thereafter no longer possess any means of waging war." *Khruschev* speaking before the General Assembly on September 19, 1959 stated: "The task is to find a lever by grasping which it will be possible to stop mankind from sliding into the abyss of war. What is essential now is to rule out the very possibility of war being started. So long as there exist large armies, large air forces and navies, nuclear and rocket weapons, so long as young men on the threshold of life are first of all taught the art of warfare and general staffs are busy working out plans of future military operations, there is no guarantee of stable peace. The Soviet Government, having comprehensively considered the situation, has come to the firm conviction that the way out of the deadlock should be sought along the lines of general and complete disarmament."

The Soviet proposal detailed out a number of measures spread over a period of four years for complete disarmament. It provided that States should retain only strictly united contingents of police and militia with small arms and designed solely to maintain internal order and protect the personal security of citizens. It contemplates the establishment of an international control body. In the first stage it proposed reduction of the strength of the armed forces of Russia, America, China, Great Britain and France to specified numbers together with reduction of armament and war material. In the sceond stage complete abolition of the armed forces retained by the States and the removal of all military bases on foreign territory has been proposed. The plan requires in the third stage the destruction of all types of nuclear and rocket weapons and liquidation of air force material, prohibition of production, possession and storing of chemical and bacteriological weapons, of scientific research for war purposes and the termination of all military training and *musters*. This programme of general and complete disarmament is to be carried out by the States in strict conformity with the time limit specified in the treaty.

The efforts of the last fourteen years have so far not brought into existence a treaty on complete disarmament of nations but they have succeeded in mobilizing public opinion in favour of disarmament as the surest way to peace.

PART III

LAW OF WAR

CHAPTER XL

SETTLEMENT OF INTERNATIONAL DISPUTES

International Disputes—International disputes are either legal or political. They are sometimes called justiciable and non-justiciable disputes. It was at one time maintained that disputes which could not be decided by existing rules of International Law were non-justiciable or political disputes and that those disputes which could be decided by existing rules of International Law were justiciable or legal. The present juristic thought is in favour of the veiw that disputes in which the parties to it base their claim or contention on rules of International Law are legal and justiciable while all other disputes are political and non-justiciable. These disputes can be settled amicably or by compulsive means. The amicable means by which international disputes can be settled are negotiation, good offices and mediation, conciliation, arbitration and judicial settlement.

Negotiation.—It is the simplest means of settling disputes arising between the States. "In the international sphere and in the sense of International Law, negotiation is the legal and orderly administrative process by which Governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences."[1] Negotiations for the settlement of a dispute may take place either by diplomatic correspondence or in personal conferences between representatives of the disputing States. Treaties frequently provide for negotiations as the first step towards settlement of disputes arising between the contracting parties.

Negotiations properly conducted have the effect of narrowing down the controversy and often result in the settlement of disputes or in compromise.

Good Offices and Mediation.—The term 'Good Offices' in its broad sense refers to an act of a third State or its official in trying by friendly suggestions to bring about an adjustment of a controversy between two States. The friendly suggestions of third States or their officers have often the effect of alleviating the ten-

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1. The Case of the Mavrommatis Palestine Concessions P. C. I. J. Series A No. 2 (per Moore J.)

sion in the relations between the disputing States. The State tendering its good offices uses its influence towards a friendly settlement of the question at issue and devises a mode of the controversy. Good offices have often brought good results. In 1905 the President of the United States by his good offices brought the war between Russia and Japan to an end.

Legal theory makes a distinction between good offices and mediation, for while good offices consist in endeavours to bring about negotiations between the disputing States, mediation consists in efforts to bring about a settlement between the disputing parties on the basis of the proposals made by the mediator. "In these modes of composing a quarrel, the intervention of third parties aims, not at deciding the quarrel for the disputing parties but at inducing them to decide it for themselves. The difference between the two first terms is not important ; strictly a State is said to offer 'good offices', when it tries to induce the parties to negotiate between themselves, and to 'mediate', when it takes a part in the negotiations itself but clearly the one process merges into the other."[1] The distinction between good offices and mediation is however not clearly apparent in practice. "Mediation is, therefore not only the consequence of the tender of good offices, but also the manifestation of the exercise thereof."[2] In mediation the political influence of the mediator comes into play and leads to a settlement of the question at issue. The mediator may or may not directly conduct negotiations between the opposing States.

The Hague Conventions for the Peaceful settlement of International Disputes emphasised the use of good offices and mediation in the settlement of disputes. It laid down that States not parties to a dispute had a right to render good offices and offer mediation for the purpose of bringing about settlement of a controversy. According to these Conventions good offices and mediation had an advisory character and were not binding on parties to a dispute.

The Charter of the United Nations requires the parties to any dispute which is likely to endanger international peace and security to resort to means of pacific settlement. Mediation has been pointed out as a mode of amicable settlement. The Security Council when it deems necessary has to call upon parties to a dispute to adopt peaceful means of settlement of their disputes. The Charter lays down the principle of collective mediation in international disputes. It imposes an obligation on the members to refer a dispute likely to endanger maintenance of international peace and security

1. J. L. Brierly—The Law of Nations p. 269-270.

2. . B. Scott, The Hague Peace conference I, 260.

and which the parties have failed to settle by peaceful means to the mediation of the Security Council. The United Nations made use of these means in a number of cases. In the solution of the Indonesian question it appointed a Committee of Good Offices; on the Kashmir question it set up a Commission of Investigation and Mediation.

Conciliation.—Conciliation as a mode of amicable settlement of international disputes marks a development in international law during the period between the two World Wars. The Hague Conventions for the pacific settlement of International Disputes for the first time introduced the device of appointing Commissions of Inquiry for the purpose of facilitating amicable settlement of disputes. The reason for the appointment of such Commissions is obvious for no settlement is possible unless there has been an ascertainment of true facts involved in the dispute. Thus, the Hague Conventions required the parties to an international dispute not involving honour or vital interests but arising from a difference of opinion on questions of fact, to appoint an International Commission of Inquiry to facilitate the solution of the dispute. The Commission of the Inquiry was to be established by an agreement arrived at between the opposing States. The function of the Commission was to make an impartial and conscientious investigation into the facts and to make a report. The report of the Commission did not have the character of an award and the parties to the dispute were free not to act upon it. Such a Commission of Inquiry was made use of in the famous Dogger Bank dispute between Great Britain and Russia in 1904 with good results.

Bryan Peace Plan.—Approving of the idea underlying the appointment of Commission of Inquiry the United States prepared a plan known as the Bryan Peace Plan. This Plan consisted of a series of treaties concluded between the United States and a number of foreign State whereby an extensive use of the method of enquiry by means of an impartial commission was made. The so called Bryan Treaties provided for reference of all disputes arsing between contracting parties in which diplomatic methods of settlement had failed, to a Permanent International Commission in case the treaties in force between the disputants, did not provide for arbitration of these disputes. The Permanent International Commission was to be appointed within a specified time. These treaties further provided that the function of the Permanent International Commission was to make an investigation into facts of a particular dispute and to make a report within a specified time. The Permanent Commission was to be composed of five members, one chosen by each of the contestants from among their own nationals, one chosen by each of the contestants from a

third State and the fifth on agreement of the contestants from among the citizens of a third State. The merit of these treaties lay in the fact that they, by compelling the parties to refer the matter to the Permanent Commission for report, advanced the cause of peace.

After the First World War the device of appointing Commissions of Inquiry appeared to be inadequate in preventing war and the mode of settlement by conciliation was introduced in International Law. Conciliation is defined as "the process of settling a dispute by referring it to a Commission of persons whose task it is to a elucidate the facts and (usually after hearing the parties and endeavouring to bring them to an agreement) to make a report containing proposals for a settlement, but which does not have the binding character of an award or judgment."[1] Conciliation differs from mediation for in conciliation the parties to a dispute refer the matter of differences to a body of persons for ascertaining the facts and making their proposals for a settlement while mediation involves negotiations between the disputants in which the mediator takes part. Conciliation also differs from arbitration for conciliation results in proposals for settlement which the parties to a dispute are free to disregard while arbitration ends in an award by which the parties are bound.

The period after the close of the First World War saw the conclusion of a number of treaties between different States providing for the machinery of conciliation for pacific settlement of international disputes. The various treaties of Locarno of 1925 provided for reference of disputes as to respective rights of the parties to Permanent Conciliation Commission before referring them to arbitration. After the Second World War the mode of settlement by conciliation was adopted in the American Treaty of pacific settlement of 1948 which provided for commission of investigation and conciliation. The function of the commissions of investigation and conciliation was to go into the facts and to make recommendations for the settlement of the dispute. These recommendations had no binding force on the parties. The Treaty of Brussels of 1948 also provided for conciliation in disputes not required to be judicially settled.

Arbitration.—Arbitration is one of the several methods of peaceful settlement of an international dispute. This is not a new method but it was known to States of the ancient times also. It was, however, not in frequent use in those times when wars were regarded as good means of deciding controversies. The development of International Law brought arbitration into prominence and the history of international events shows that it was at the end of eighteenth century that States began to utilize arbitration as a

1. Oppenheim.—International Law Vol. II (Seventh Edition) p. 12.

method of adjusting controversies arising among them. In 1794 was concluded the Jay Treaty of arbitration between Great Britain and the United States. Thereafter several treaties providing for arbitration on a number of disputes were signed between different States. The Hague Conventions for the Pacific settlement of international disputes made in 1899 and revised in 1907 established the Permanent Court of Arbitration. The signatories to these Conventions agreed to appoint four members for the Permanent Court of Arbitration. From among the panel of the members appointed, each of the parties to a dispute selectd two members both of whom were not to be the nationals of the party which selected them. The four arbitrators thus selected were to appoint an umpire. These five constituted the Court for that dispute. Thus it would appear that there was a permanent panel of arbitrators but no Permanent Court. The Hague Conventions set out a complete procedure for arbitration. The permanent Court of Arbitration gave its award in many important international disputes and served the useful purpose for which it was established. There has been no reference to this Court since 1932 but it still exists and has its Bureau at the Hague.

"Arbitration means the determination of a difference between States through a legal decision of one or more umpires or of a tribunal other than the International Court of Justice, chosen by the parties."[1] Arbitration is a judicial function and is closely allied to judicial settlement by International Court of Justice. The arbitrators are chosen by the parties and their award is as much binding on the parties as a decision by the Court. "Arbitrators and Judges are alike bound to decide accordidg to rules of law, neither possesses a discretionary power to disregard the law and to decide according to their own ideas of what is fair and just."[2] When parties to a dispute have recourse to arbitration they authorise the arbitrators chosen by them to decide their differences and they have a right to lay down principles according to which they desire their differences to be decided. The arbitrators are to act within the scope of their authority and are bound to decide the dispute according to the principles laid down by the parties. Buf the International Court of Justice has no such limitations. The treaties of arbitration concluded between the states sometimes lay down principles of law or procedure on which the arbitration is desired by the contracting parties to proceed. In the absence of any express provision, the arbitrators are bound to apply the rules of International Law. An arbitral award is final between the parties and is binding upon them unless the parties have agreed otherwise.

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1. Oppenheim—International Law, Vol. II (Seventh Ed.) p. 12.
2. J. L. Brierly—The Law of Nations, p. 251.

Arbitration differs from mediation. An arbitrator discharges a judicial function inasmuch as he decides the matter by applying Law and judicial methods, while a mediator discharges an advisory function inasmuch as he recommends and advises the parties on the solution of a dispute. "The essential point is that the arbitrators are required to decide the difference—that is, to pronounce sentence on the question of right. To propose a compromise or to recommend what they think best to be done, in the sense in which best is distinguished from most just, is not within their province, but is the province of mediator."[1]

Judicial Settlement.—The Parmanent Court of Arbitration proved inadequate to some extent in deciding International disputes and after the close of the First World War it appeared expedient to establish a Court for the purpose of deciding international disputes judicially. The Permanent Court of International Justice was established under the provisions of the League of Nations. It has now been replaced by the International Court of Justice as the principal judicial organ of the United Nations. A detailed description of the Court has already been given. The Statute of the International Court of Justice lays down that whenever a treaty or international agreement in force provides for reference of a matter to the Permanent Court of International Justice, the matter is to be brought before the International Court of Justice. The parties to a dispute are free to refer the matter for a judicial settlement to the International Court of Justice.

Pacific settlement under the Covenant.—The Covenant of League of Nations contained a scheme for for the pacific settlement of international disputes. The Members of the League were, in case a dispute likely to lead to a rupture arose, under an obligation to submit the matter either to arbitration, or judicial settlement or to enquiry by the Council. The Members of the League had further agreed not to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council. The Covenant provided that the award or the judicial settlement was to be made within a reasonable time while the report of the Council was to be made within six months after the submission of the dispute. These provisions had the great merit of delaying the war and thus cooling down the inflamed feelings of the disputants.

The Covenant in Article 13 laid down that the Members of the League were bound to submit a dispute which they recognised to be suitable for arbitration or judicial settlement and which had not

1. Westlake—International Law (Second Ed.) p. 354.

been settled by diplomacy, to arbitration or judicial settlement. The Members agreed to carry out in good faith any award or judicial decision rendered in connection with an international dispute and not to resort to war against a party which had complied with the award or judicial decision. Disputes as to the interpretation of a treaty, as to any question of International Law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach were enumerated in the Covenant as suitable for submission to arbitration or judicial settlement. The judicial settlement referred to in the Covenant was to be made by the Permanent Court of International Justice.

In Article 15 of the Covenant it was provided that a dispute which was likely to lead to a rupture and which was not submitted to arbitration or judicial settlement was to be submitted to the Council. Any party to the dispute was permitted to make the submission to the Council by giving a notice to the Secretary-General about the existence of the dispute. The duty of the Council in the first instance was to make an endeavour to bring about a settlement of the dispute and if it was successful in its efforts, it was to publish a statement of the facts and the terms of the settlement. In case the Council failed in its efforts to bring about a settlement it was under a duty to 'make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.' The report of the Council was either to be by an unanimous vote or by a majority vote. If the report was unanimous, the members were bound not go to war with any party to the dispute which complied with the recommendations embodied in the report. On the other hand, if the report was made by a majority vote only, the members reserved to themselves the right to take such action as they might consider necessary for the maintenance of right and justice. In no case the recommendations contained in the report of Council were binding on the disputants. The only guarantee was that the members could not resort to war against a party which had complied with the recommendations contained in a report made by an unanimous vote. The Council was however not bound to make recommendations for a settlement if it appeared to it that the dispute, as claimed by one of the parties, arose out of a matter which by International Law was solely within the domestic jurisdiction of that party.

Then came the sanction provisions of article 16 which laid down that a member resorting to war in disregard of the earlier provisions of articles 12, 13 and 15 was to be deemed to have

committed an act of war against all other members. In such a case the members were under an obligation to sever all trade or financial relations with the guilty party, to prohibit all intercourse between their nationals and the nationals of the covenant-breaking State and to prevent all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of a member or non-member. In case of resort to war in breach of the Covenant the Council was under a duty to recommend to several governments concerned what effective military, naval or air-force the Members of the League were to contribute severally to the armed forces to be used to protect the Covenant af the League. The action of the League was designed to be on a cooperative basis and it worked well so long as States were inclined to lend their goodwill.

Settlement under the United Nations—The Charter also contains a scheme for the pacific settlement of disputes in Chapter VI. It is provided therein that the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, are bound, in the first instance, to seek a solution by negotiation, enquiry, mediation conciliation, arbitration, judicial settlement, resort to regional agencies, or arrangements, or other peaceful means of their own choice. It may, however, be noticed that while the Covenant required the members to submit their disputes to arbitration, judicial settlement or to the Council the Charter makes it obligatory on the members to resort to the various methods of peaceful settlement of international disputes. The dispute referable to the Council or to arbitration or judicial settlement under the Cavenant was one which was likely to lead to a rupture. In the Charter the dispute in which the parties are required to resort to peaceful methods of settlement is one the continuance of which is likely to endanger maintenance of internatianal peace and security. Again, those disputes which are likely to endanger maintenance of international peace and security are to be submitted to the Security Council. The Security Council is to decide whether the dispute is one the continuance of which is in fact likely to endanger the international peace and security. If all the parties to a dispute go to the Security Council with their dispute, the Security Council has the power to make recommendations to the parties with a view to a pacific settlement of that dispute.

Apart from the above provisions, the Charter lays down that the Security Council shall, when it deems necessary, call upon the parties to settle their disputes by peaceful methods enumerated above. The Security Council has the right to investigate any dispute or any situation which might lead to international friction or

given rise to a dispute, in order to determine whether the dispute or situation is likely to endanger maintenance of international peace and security. Any member of the United Nations may bring any dispute or situation to the notice of the Security Council or the General Assembly. Any State not a member of the United Nations, if it accepts in advance for the purposes of a dispute the obligations of pacific settlement provided for in the Charter, may bring any dispute or situation to the notice of the Security Council or the General Assembly. The Security Council is authorised to make, at any stage of a dispute, continuance of which is likely to endanger maintenance of international peace and security, recommendations with regard to appropriate procedure or methods of adjustment. If the parties fail to settle their dispute by peaceful means, they have a right to refer it to the Security Council and if the Security Council thinks that the dispute is likely to endanger maintenance of international peace it has to recommend appropriate terms of settlement.

If all methods of peaceful settlement of a dispute fail the Security Council has to take enforcement action under chapter VII of the Charter. If the Security Council decides that an action by it is necessary it may adopt measures not involving the use of armed forces and direct complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications and the severance of deplomatic relations. Should these methods also fail, the Security Council may take such action by air, sea and land forces as may be necessary to maintain or restore international peace.

Compulsive Means of Settlement of Dispute.—When amicable means fail to bring about settlement of international disputes it is not unusual for States to adopt compulsive means to end the controversy. International Law recognises the right of States to employ non-amicable processes involving actions short of war for the purpose of solving the differences. The non-amicable or compulsive means are retorsion, reprisal, pacific blockade and intervention.

Retorsion.—Retorsion technically means retaliation. Oppenheim defines retorsion as "retaliation for discourteous or unkind, or unfair and inequitable acts by acts of the same or a similar kind"[1]. According to Westlake retorsion refers to "the action taken by a State in onder to compensate it for some damage suffered through the action of another State or in order to deter the action complained of."[2] Retorsion consists in retaliatory answer

1. Oppenheim—International Law, Vol. II (Seventh Ed.) p. 134.
2. Westlake—International Law, Vol. II (2nd Ed.) p. 6.

given by one State to the unfriendly, discourteous or unfair acts of another State. There are some jurists who maintain that retorsion may be employed not only for unfriendly, discourteous and unfair acts but also for illegal acts. "Retorsion may be answer given to internationally illegal conduct."[1] Oppenheim's view is that the act which calls for retorsion is not an illegal act but is an act within the competence of its author.

It is the State, which feels aggrieved by a certain unfriendly or discourteous act of another State, that can retaliate by doing the same or similar act. Whether or not retaliatory action is justified depends on the facts and circumstances of each case. There is no particular form in which retaliatory answer is given. Hall States that retorsion "consists in treating the subjects of the State giving provocation in an identical or closely analogous manner with that in which the subjects of the State using retorsion are treated. Thus if the productions of a particular State are discouraged or kept out of a country by defferential import duties, or if its subjects are put at a disadvantage as compared with other foreigners, the State affected may retaliate upon its neighbours by like laws and tariffs."

Reprisals.—"Literally and historically it denotes the seizing of property or persons by way of retaliation, and formerly it was not uncommon for a State to issue 'letters of marque' to one of its own subjects, who had met with a denial of justice in another State, authorising him to redress the wrong for himself by forcible action such as the seizure of the property of the subjects of the delinquent State. The practice was called 'special reprisals' but it has long been obsolete."[2] Reprisals in modern times consist in coercive measures of self help taken by one State against another for the purpose of securing redress for or of preventing recurrence of an international delinquency. Oppenheim defines rerisals as 'such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency."[3] Though retorsion and reprisals are both measures of retaliation they differ materially for while retorsion is retaliatory answer given for an unfriendly, discourteous or unfair act, reprisals consist in illegal acts committed by a State against another to obtain redress for an international delinquency. Retorsion is not resorted to against an

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1. Hyde—International Law, Vol. II, p. 1658.
2. J. L. Brierly—The Law of Nations, p. 297.
3. Oppenheim—International Law Vol. II (Seventh Ed.) p. 186.

international delinquency while reprisals are permitted only against an international delinquency.

Reprisals are permitted by International Law in all cases of denial of Justice and in acts of international deliquency. A reprisal is a reaction of the State which is aggrieved by an act resulting in denial of justice or an international delinquency committed by another State. The "Naulilaa Case" decided by Special Arbitral Tribunal lays down the conditions under which reprisals are permitted by Inteanational Law.[1] In October 1914 while Portugal was still neutral the Poruguese post at Naulilaa shot a German official and two German Officers of the German South-west Africa. At the order of the Governor of South-West Africa measures of reprisals were taken by German forces which attacked the fort of Naulilaa on Portuguese soil. A general expeditionary force was also sent to the fort at Naulilaa and in the fight that ensued the Portuguese forces were defeated. Portugal maintained that reprisals were illegal and that Germany was liable for damages caused by its forces. The matter was referred to Special Arbitral Tribunal which held that measures of reprisals taken by Germany were unwarranted under the International Law and that Germany was liable for damages. The Tribunal accepted the principle that reprisals are acts of self-help by injured State, acts in retaliation for acts contrary to International Law on the part of the offending State, which have remained unredressed after a demand for amends. This case is an authority for the proposition that the first condition, in fact the sine qua non, of a resort to reprisals is the existence of a previous act contrary to International Law. The Tribunal in this case also laid down that reprisals are only legitimate when they have been preceded by an unsuccessful demand for redress and that employment of force is only justified by necessity. It is necessary that before measures of reprisals are taken the aggrieved State should demand reparations from the delinquent State. The measures adopted should not be excessive or out of all proportion to the provocation received.

A State in taking measures of reprisals acts through its armed forces, men-of-war and its officials. The objects against which reprisals can be directed are all things that belong to the delinquent State. Property and persons belonging to the delinquent State are both objects of reprisals.

There are two kinds of reprisals ; viz., positive and negative reprisals. Positive reprisals consist in acts involving international deliquency which the offended State commits as retaliatory measure

1. Annual Digest of Public International Law Cases 1927-1928 Case No. 360.

against the international delinquency committed by another State. Negative reprisals consist in refusal or failure on the part of the offended State to perform an international obligation on the ground of retaliation. The measures taken in respect of both the positive and negative reprisals must be in proportion to the injury caused by the international delinquency.

Embargo.—In International Law the term 'Embargo' means detention of ships in port. Embargo is a special form of reprisal and consists in detention of ships belonging to the delinquent States in the port of the aggrieved State. The aggrieved State in order to secure redress of the wrong done by the delinquent State has a right to prevent ships belonging to the deliquent State from leaving its port.

Reprisals in any shape however end when the delinquent State makes reparations for the wrong done by it.

Pacific Blockade.—A pacific blockade is another compulsive process which States employ for the purpose of settling their differences. It is an act of force committed during peace with a view to bring about settlement of a dispute. Pacific blockades consist in cutting off ingress to or egress from a port or coast of the offending State with the object of forcing the offending State to make redress of the wrong done to the blockading State. In a pacific blockade there is no seizure of property or person. What the blockading State does is to cut off access to or egress from the port or coast of a foreign State and thus coerces the foreign State to yield to the demands made by the blockading State.

It is obvious that the blockading State has a right to prevent ships of the blockaded State from coming out or going into the port or the coast of the blockaded State. The question that arises is whether the ships of a third State can be prevented from going into or coming out of the blockaded port or coast. Legal theory does not support the right of the blockading State to enforce a pacific blockade against the ships of a third State. But practice is different, for in many cases pacific blockade has been enforced against ships of a third State. Jurists agree that the blockading State has no right to seize and sequestrate ships of third States which try to break a pacific blockade. But in practice which prevailed before 1850 it was usual for the blockading States to seize and sequestrate ships of third State when they tried to break the pacific blockade. Pacific blockades established after 1850 have not given rise to an uniform practice. Sometimes the Pacific blockades were enforced against ships of third States. It is not disputed that the ship of the blockaded State

when they try to break the blockade are liable to be seized and sequestrated.

A pacific blockade is to be established only after the failure of negotiations to settle the dispute. A previous declaration as to date and hour of the establishment of the blockade is necessary. Like a war blockade, a pacific blockade must be effective.

Intervention.—Intervention as a measure for the settlement of an International Dispute is a dictatorial interference by a third State which makes the dictatorial interference exercises its powerful influence over the disputing States and thus compels them to settle the dispute in the way suggested by it. This dictatorial interference is made by means of communications to the disputants and takes the form of a threat.

Compulsive settlement under the United Nations.—The main idea permeating throughout all the provisions of the Charter is to avoid war and maintain peace among States. The preamble begins with a determination to save succeeding generations from the scourge of war and contains a declaration to unite strength to maintain international peace and security and to ensure that armed force shall not be used save in the common interest. The first purpose of the establishment of the United Nations is stated to be to maintain international peace and security and to that end to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace and to bring about by peaceful means and in conformity with the principles of justice and International Law adjustment or settlement of international disputes or situations which might lead to a breach of peace. In article 2 (3) there is an obligation on the members of the United Nations to settle their international disputes in a peaceful manner. In Article 2 (4) the members undertake to refrain in their international relations from threat or use of force against the territorial integrity or political independence of any State. Alongside these provisions which ban threat or use of force there is Article 51 which preserves the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security. The effect of this provision is that a State has a right to use armed forces in self defence to repel an armed attack that may be made against it. This right of self-defence cannot be exercised after the Security Council on being apprised of the situation takes necessary measures. But this right of self-defence though restricted does not entitle a State to have resourse to

those compulsive methods of settlement of international disputes which involve the use or threat of force. In Article 37 it is provided that if the parties fail to arrive at a settlement of a dispute by peaceful means mentioned in Article 33 the dispute is required to be referred to the Security Council. The Security Council on the dispute being referred to it will consider if the dispute is such as is likely to disturb international peace. If it considers that the dispute is of such a character, it has to decide whether it should act under Article 36 and recommend appropriate procedures or methods of adjustment or to recommend snch terms of settlement as it may deem appropriate. If all these fail to secure the desired object the Security Council is obliged to take enforcement action provided for in Chapter VII. All these provisions make it clear that these compulsive means of settlement which involve use or threat of force cannot be adopted by the States. Except retorsion all cumpulsive means of settlement involve use or threat of force and these can not be permitted under the Charter. The result is that individual States cannot on failure of peaceful means of settlement adopt compulsive measures of reprisals, embargo, pacific blockade or intervention.

But the compulsive means are available to the Security Council in case it considers there is in existence threat to the peace, breach of peace or an act of aggression. The Security Council may not in the first instance adopt compulsive means but may make recommendations. The Security Council on failure of the parties to the dispute to comply with its recommendations is to take an enforcement action. The Security Council is authorised to make provisional orders as it may deem fit and proper. The recent events in Korea show how the Security Council Acts in a situation which is likely to disturb the peace of the world. In case the measures provided for in Article 41 prove inadequate the Security Council may take such action by air, sea or land forces as may be necessary to restore or maintain international peace and security. It would thus appear that compulsive means of settlement are to be adopted only by the Security Council on behalf of the United Nations as a body and it is not open to individual States to employ them.

CHAPTER XLI

WAR (GENERAL)

War and renunciation.—In the absence of central authority powerful enough to enforce International Law the possibility of War cannot be altogether excluded. The experiences of the last two global wars teach us that no pact, no treaty and no world conventions are effective in preventing recurrence of wars. "Until the fir tree and the myrtle tree supplant the thorn the brier wars may be expected to recur. Despite the growth of opinion pervading the international society that differences between states should be settled by amicable means, whenever feasible, by judicial process, and notwithstanding the formal renunciation by most of States as an instrument of national policy, the opinion still prevails in many quarters that a controversy may come into being for the adjustment of which the parties will probably rely upon the sword regarding recourse to war as a reasonable and perhaps necessary or honourable procedure".[1]

Before the General Treaty for the Renunciation of war as an instrument of national policy war as an ultimate means of self-help was the supreme sanction of International Law, the ultima ratio, the last argument in the controversy arising between two States. International Law recognised the right of a sovereign State to wage war for the vindication of its rights. The recognition of this right to wage war led to a distinction between just and unjust war. This distinction had no practical value for it had not the effect of putting a stop to war.

War was regarded as a means of enforcing rights and duties conceded by International Law. It was also recognised as a legitimate means of altering the existing rights of the States. "As a means of changing the law, it constituted a radical break in the continuity of the system of International Law and was analogous to the authorisation of a revolution in the very constitution of the State". conception of war changed with the times which witnessed numerous efforts on the part of States to avoid war as much as possible.

The Hague Conference of 1899 providing for pacific settlement of international disputes clearly indicated that States were disinclined to resort to war for the settlement of disputes The Second Hague Convention of 1907 besides providing for more suitable methods of peaceful settlement of international disputes laid down

1. Hyde—International Law (Second Revised Edition) p. 1679.
2. Oppenheim—International Law, vol. II (Seventh Edition) p. 179.

rules restricting the right to resort to war for contract debts. Another factor leading to change of attitude towards war was the conclusion of a number of treaties known as 'Bryan Arbitration Treaties' which made it obligatory for contracting parties to refer their disputes to a Permanent International Commission for investigation and report and not to resort to war before the report of the Commission.

The First World War gave a lesson that States should not have an unfettered discretion in waging a war. The misery that it brought called for an all-round effort to minimise the chances of recurrence of another war. The Covenant of the League of Nations proclaimed 'that any war or threat of war whether immediately affecting any of the Members of the League or not was a matter of concern to the whole League." The Covenant laid down the principle of collective responsibility of the members of the League for the maintenance of International peace and security. The right to make war was very much restricted. The Assembly of the League on more than one occasion adopted resolutions denouncing wars of aggression and prohibiting them. At that time several treaties in which contracting parties under took not to go to war between themselves came into existence. The Locarno Treaty of 1925 was one of such treaties. In 1928 followed the famous Pact of Paris or the General Treaty for the Renunciation of War which deprived war of its former legal character as an instrument of self-help. After this treaty war cannot be legally resorted to by the States. The Charter of the United Nations not only reaffirms the principle of the Pact of Paris but provides for very effective measures for the prevention of war and maintenance of peace.

Concept of war and definitions.—As already stated, war is at present not a means of self-help recognised by International Law. The conception that every State has a right to make war does no longer exist. The question is whether war stands for a specific status or a specific action and whether war is a bilateral or unilateral action. No unanimity among writers and jurists exists on this matter. Grotius defined War as a state or condition of Governments contending by force and to him war meant a specific status. Other writers maintain that the term 'war' stands for a specific action. Kelsen regards war as a specific action and not a status and argues that although mere declaration of war without the use of armed force may bring about a state of war so as to make certain rules of International Law applicable, most of the rules concerning war come into operation only when there is use

of armed forces. According to him no state of war in the full sense of the term comes into being so long as there is no use of armed forces and acts of war alone bring the rules of International Law into full operation.[1]

To define war as a contest between two or more States through their armed forces is to convey an idea that war is not an unilateral action. In a world disciplined under the United Nations Organisation war is forbidden and is a delict. As soon as a State in violation of its obligations imposed by the Charter declares a war and uses force and starts an action through its armed forces, the other States have a collective responsibility to meet force in order to restore peace. Even apart from obligation of the Charter, an act of war commenced by a State must be counteracted if necessary with the aid of armed forces though unwillingly. The British Court of Admiralty in the Case of the Eliza Ann observed :—

"A declaration of War by one country only is not, as has been represented, a sure challenge, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may perhaps, think proper to act on the defensive only."[2]

The same Court in another case declared that it was by no means necessary that both countries should declare war.[3] War is thus an unilateral action. Kelsen holds that war whether considered to be a delict or a sanction cannot be defined as a bilateral action but as an enforcement action involving the use of armed forces.[4]

The definition of war according to the above theory as given by Kelsen is :—

"War is, in principle, an enforcement action involving the use of armed force performed by one State against another constituting as it does an unlimited interference in the sphere of the interests of the other State."

Oppenheim defines war as "a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases"[5]

Oppenheim is opposed to the view that war is unilateral action. He observes that unilateral acts of force may be a cause of war

1. Hans Kelsen—Principle of International Law, p. 26.
2. The Eliza Ann (1813), Dodson 244.
3. The Nayade (1802) 165 English Reports 602.
4. Hans Kelsen—Principle of International Law, p. 31.
5. Oppenheim—International Law, vol. II (Seventh Edition) p. 202.

but cannot amount to war itself. He points out that acts proposed by one State against another by way of reprisals are not necessarily acts initiating war, and that acts of force unless met by acts of force from other side do not constitute war. According to him war action is through armed forces and the purpose of the war as distinguished from end of war is to overpower each other.

Prof. Moore agrees with Oppenheim when he observes : "Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed, on the other hand, force may be employed by one nation against another, as in the case of reprisals and yet no state of war may arise. In such a case there may be said to be an act of war but no state of war. The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to the performance of duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights."[1]

War and Civil War.—A civil war is different from War. While war is a contention between States, a civil war exists within a State between revolutionary groups and the legitimate Government of the State. A civil war is an internal affair of a State and does not concern other States. Recognition of insurgents as belligerents turn a civil war into an International war. This recognition may be granted by legitimate government against which the revolt is directed. Insurgency may be recognised as belligerency not by the legitimate Government but by other States. Ordinarily, on the recognition of other States, the legitimate government has a duty to deal with the insurgents in accordance with the rules of war.

Guerilla War.—According to Dr. Lieber the term guerilla is the diminutive of the Spanish word guerra, meaning petty war, that is, war carried on by detached parties and a guerilla party means an irregular, self-constituted band of armed men carrying on irregular war not being able to carry on a regular war.

1. Moore—Digest of International Law vol. VII pp. 153—154.

A regular International War requires organised armed force ; war carried on by guerilla parties who cannot fight openly by reason of lack of organisation as well as by insufficiency of their force but who make attacks occasionally and then go into hiding cannot be called regular war. A guerilla party may have different motives for their warlike operations. They may or may not be concerned with the result of an existing or terminated war. They may only be a set of armed prowlers bent upon robbing, killing and various other improper acts in times of war and although they may appear from the side of one belligerent and may carry on their operations against the other belligerent they are, if captured, not entitled to the privileges of prisoners of war.

There is, however, another class of guerilla band which is very much concerned with the result of a war. The guerilla war of which International Law takes notice though not a regular war is yet so connected with it that its participants enjoy the same privileges as are conceded to members of regular armed forces engaged in regular war. Oppenheim states, "Guerilla war consists in hostilities conducted in territory occupied by the enemy, by armed bodies of men who do not form part of an organised body".[1] Under modern conditions of warfare the occupation of territory by the enemy is more often than not nominal or temporary and the guerilla activities of civil population or the remnants of the vanquished army in their anxiety to wrest the territory from the enemy are often justified.

These men of guerilla war enjoy the same privileges and treatment as the members of the armed forces provided they respect the laws of war. If captured they are to be treated as prisoners of war under the Hague Regulations. The Convention allows privileges on certain conditions to the members of the militias and voluntary corps which do not form part of the regular armed forces and to the gureilla parties engaged in sporadic attacks for the purpose of recovering the occupied territory from the enemy.

Laws of war and their development.—Laws of war consist of those rules of International Law as regulate the conduct of war. These laws have nothing to do with the question of the right to make war but deal with the proper conduct of the belligerents during the war itself. The savage cruelty

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1. Oppenheim—International Law vol II (Seventh Edition) p. 212.

and ruthlessness with which wars in early times were fought and the great miseries that these wars brought led thinkers and philosphers to formulate rules to regulate the conduct of war which they found impossible to abolish.

The development of the laws of war began in the later part of the Middle Ages under the influence of the Christian ideas of humanity and chivalry. Since then the rule-making process has been going on through the agencies of Conferences, Conventions, treaties and through the persuasive writings of thinkers and jurists. Gradual development influenced by the principles of humanity, morality and chivalry continued throughout. The eighteenth and the 19th centuries witnessed great progress in the development of the laws of war because of the occurrences of huge political upheaval and the Great Wars that shook Europe. The Declaration of Paris of 1856, the Geneva Convention of 1864, the Declaration of St. Petersburg of 1868 and the Convention relating to the Laws of War on Land arrived at the First Hague Conference of 1899 are the most important general treaties which helped the development of Laws of War during the later half of the nineteenth century. By the end of the nineteenth century an elaborate body of customary laws of war had come into existence. Though the customs and usages of war found place in the works of eminent leading jurists the law in some respects was uncertain and doubtful and needed classification.

The important agencies of development of laws in the twentieth century were the general treaties that were concluded under the auspices of Hague Conference. The merit of these Hague Conventions lies in their clarificatian of the uncertain customary rules of war that already existed. Some of these Conventions were expressed to be binding only in war in which the signatories to the Convention were the belligerents, and thus they provided a loophole for evasion of the rules laid down therein. But in spite of this 'general participation clause' States in general regarded them to be binding and the British Courts held them to be valid. The Nuremburg International Tribunal in 1946 expressed the view that these conventions embody rules of customary law. The failure of several States to ratify some of these Hague Conventions did not affect their validity and binding force. They are now well recognised as embodying customary laws of war.

The First World War with its new weapons of destruction found many of the rules of war inapplicable and the result

was that belligerents felt themselves free in many respects in the conduct of their war. The result was that many of the rules of war perished under the stress of new conditions of warfare ; only a few survived. In the presence of the League of Nations with its system of collective security the effort to revise and to formulate new laws of war took a concrete shape in the Washington Conference of 1921. The appearance of the Pact of Paris and other international attempts to abolish war did not allow the Conference to reach final agreement on the subject. Then came the Second World War which tore to pieces many established traditional rules of War and the principle of 'military necessity' found its widest scope. After the Second World War majority of States met at Geneva Conference and concluded a Final Act in 1949 for the protection of War victims.

The future of the laws of war is uncertain. The charter has forbidden war. Let us hope war will not occur. But the question is whether the customary laws of war will be able to restrain belligerents in their conduct of war if war takes place. To this question Fenwick makes reply that the traditional laws of war are not likely to exercise any restraint upon military commanders and the only laws of war that are likely to hold field in future war would be the moral instincts and restraint of the individual commanders.[1]

Region of war.—There are two terms 'region of war' and 'theatre of war' which may be kept in mind. The Hague Regulations use the term 'theatre of war' to mean that part of territory on which hostilities actually take place and distinguish it from the term 'region of war'. Oppenheim defines 'region of war' as "that part of the surface of the earth in which belligerents may prepare to execute hostilities against each other."[2] The theatre of war may either be the whole region of war as in last two great wars, but it cannot fall outside the region of war. The region of war in any particular war is the territory and territorial waters of the belligerents besides the open sea. A permanently neutralised State territory is always outside the region of war.

Belligerents.—Belligerents are thoses State which participate in a war. There are at least two belligerents to a war. In wars in which there are more than one State on one or

1. Fenwick—International Law (Third Edition) p. 551.
2. Oppenheim—International Law, vol. II (Seventh Edition) p. 237.

the other side there are many belligerents of which some may be principal belligerents and the other be accessory belligerents.

Principal belligerents are those States which wage war either on their own account or on the basis of a treaty of alliance. Accessory belligerents are those States which render help to a principal belligerent by paying subsidies, by sending troops, or warships, and by other similar actions.

Armed Forces.—The armed forces of a belligerent consist of its army, Navy and Air Force. The Hague Regulations provide that the armed forces may consist of both combatants and non-combatants. Combatants are those who actually take part in the fight. Non-combatants are such persons as doctors, veterinary surgeons, couriers, chaplains, nurses and various others who do not fight but are members of the armed forces. Both the combatants and non-combatants are entitled to the same privileges and treatment. The following enjoy the privileges of the armed forces :—

(1) Irregular forces which take part in the war on the side of a belligerent provided they are under the command of a responsible person, carry a distinct emblem, carry arms openly and they observe the rules of war.

(2) Levies en masse-Belligerents may call their subjects to bear arms against the enemy or the subjects of a belligerent may rise and take up arms to fight. Both these forces are known as levies en masse which according to Hague Regulations and the Geneva Convention of 1949 are treated as armed forces.

(3) Merchant-men converted into men-of-war belong to armed forces provided it is shown that the vessel is commanded by a person in service of the belligerent, that the vessel bears external distinctive marks and that the vessel observes rules of War.

(4) Crews of merchant-men become entitled to privileges of armed forces if on an attack by the enemy men-of-war they use force in repulsing the attack. In the absence of an attack on them if the crews commit hostilities they are no better than ordinary criminals.

CHAPTER XLII

COMMENCEMENT AND EFFECTS OF WAR

Commencement of War.—War has been described to be a State of armed hostility between States or a condition of Governments contending by force. Such a State or condition comes into existence by various means. A state of war arises when one State with a view to wage war commits hostile acts on the territory of another State. It may arise by a State announcing or acting in a manner showing that it considers itself to be at war with another State. A state of war may come into existence on the failure of a State to yield to demands contained in an ultimatum given by another State. Lastly, a formal declaration of war made by a State may bring about a state of war.

Declaration of War.—It is an ancient rule which requires that a formal warning must precede a war. The ancient kings regarded it highly improper to commence war without giving a warning to their opponents. The ancient Greeks and Romans followed the practice of making a formal declaration of war before commencing hostilities. The Romans had their fetials whose duty it was to go and announce war before the commencement of hostilities. During the Middle Ages heralds were generally sent to make announcement of war to the opposing States. The practice of making formal announcement of war continued during a few centuries after the Middle Ages and thereafter it fell into disuse. In the eighteenth century it was not considered necessary that a declaration of war must precede war.

Grotius laid down the rule that a declaration of war was necessary for the commencement of hostilities. But this rule did not receive universal acceptance and States regarded themselves free to go to war without making a formal declaration of war. The sudden and unexpected attack by Japan on Russian Fleet in 1904 was in deliberate violation of the rule. In 1906 the Institute of International Law meeting at Ghent resolved that no hostilities should be commenced without a previous declaration and that hostilities should be commenced with sufficient delay after the declaration of war In 1907 the Hague Conference adopted Convention III Relative to the Opening of Hostilities which laid down the rule that hos-

tilities 'must not commence without a previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.' This Convention further required that notification of the existence of a state of war should be made without delay to the neutral powers. The Convention did not provide for any particular form in which the declaration was to be made. All that is necessary for a declaration is that it must be unequivocal and must give reasons for the resort to war. A clear intention to wage war must be clear from the language used in the declaration.

The Hague Convention III lays down a sound rule of good faith and fairplay. It is highly desirable that no war should commence without a previous declaration of war. But the rule has not been observed in many cases. In 1935 Italy made no declaration of war before commencing hostilities against Abyssinia. In 1937 Japan went to war with China without a declaration. In 1939 Russia attacked Finland and Germany and used armed forces against Poland without a declaration of war. No declaration of war preceded the commencement of hostilities between Japan and the United States in 1941. There is thus no doubt that States have violated the rule of the Convention III but there is no reason to suppose that a State is free to take up arms against another State without giving a warning in the form of a declaration of war. A war waged without previous declaration is no doubt a war under International Law but it is a war commenced in violation of a rule of General International Law. A war commenced after a proper declaration and a war without any declaration are both subject to the Laws of Warfare. A declaration of war does not constitute any justification for the war but merely marks a step towards the commencement of armed hostilities

In our times when war itself is prohibited under International Law the question of the necessity of declaration of war can hardly arise. No State is permitted to use force or threat of force and there need be no declaration of war. There is thus hardly any scope for the application of the rule of Convention III in these times

Ultimatum.—The Hague Convention III provides that a warning of the commencement of war may be in the form of an ultimatum with a conditional declaration of war. Oppenheim defines ultimatum as a "written communication by one state to another which ends amicable negotiations respecting a

British and American practice before the First Wolrd War enemy subjects residing in neutral States or on territory of the other belligerent lost their enemy character ; but according to the French practice they retained their enemy character. The British and American practice favoured residence and domicile as the test of enemy character while continental practice in general took nationality as the test of enemy character. During the First World War both British and American practice suffered a change. The English Trading with the Enemy (Extension of Powers) Act of 1915 and the American Trading with the Enemy Act of 1917 were legislations which had the effect of introducing a change in the policy which the Great Britain and the United States had hitherto followed in the determination of the enemy character. The main idea underlying these enactments was to prohibit trade with enemy persons or firms or with those who rendered service to the enemy. The English Trading with the Enemy Act of 1915 restricted trading between British subjects and enemy persons not resident in enemy territory and between such subjects and other persons in neutral territory having business associations with enemy persons. There was drawn up under this act a list of persons and firms trading with whom was declared illegal and it included many enemy persons and enemy firms in neutral States. The American Trading with the Enemy Act of 1917 defined enemy to mean (a) any individual, partnership, or other body of individuals of any nationality resident within the territory (including that occupied by military and naval forces) of any nation with which the United States is at war or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory. (b) the government of any nation with which the United States is at war, or any political or municipal sub-division thereof or any officer, official, agent or agency thereof; (c) such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States wherever resident or wherever doing the business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may by proclamation include within the term 'enemy'. On the outbreak of the Second World

War similar legislations were enacted with the result that residence and domicile as the sole test of enemy character was given up and the exigencies of war compelled both Great Britain and the United States to regard nationality also as a test of enemy character in some cases. With the change in the Anglo-American practice the States on the Continent took up measures introducing change in their former practice. The French practice which had hitherto applied nationality as the sole test of enemy character suffered a change by reason of the French Decree of September 1, 1939 which defined as enemies all persons present or habitually residing in enemy territory and all enemy subjects interned in French territory.

Julius Stone states the rule thus :—

"An individual of whatever nationality, once domiciled in the full sense within enemy territory, acquires enemy character from the moment that domicile begins, or from the outbreak of War, whichever is earlier. 'Domicile' here seems to mean permanent voluntary residence closely analogous to the similar concept in Anglo-American private international Law. The person concerned must have a general residence there, having elected to live under the protection of the enemy State and that residence must be more than temporary. Such a person is not entitled to a period of grace to break his enemy association and his enemy character taints all his property and related interests regardless of their nature, sites, origin or destination."[1]

2. **Subjects of neutral States.**—The subjects of neutral States not living on the enemy territory do not possess enemy character. They are regarded to have enemy character when they join the armed forces of any belligerent or commit other act of hostility against a belligerent. They do not acquire enemy character if they make loans to a belligerent.

But subjects of neutral States living on enemy territory are regarded to have an enemy character. According to British and American practice, subjects of neutral States as are domiciled in an enemy territory, acquire enemy character in a limited sense, inasmuch as these do not lose the protection of their home State.

1. Julius Stone, Legal Controls of International Conflicts p. 421.

3. Corporations

British Practice.—International Law contains tains no rules for determining the enemy character of a corporation. The British practice is that a corporation incorporated in an enemy country and a corporation wherever incorporated carrying on business in an enemy country or in an enemy occupied country possesses an enemy character. In the case of Daimler Co. Ltd. vs. Continental Tyre and Rubber Co. Ltd., the House of Lords held that a company possessed an enemy character 'if its agents or persons in de facto control of its affairs are resident in an enemy country, or wherever resident, are adhering to the enemy or taking instructions from or acting under the control of the enemies' and that individual character of shareholders did not affect the character of the company. The same principle was reaffirmed in Sovfracht Case in which it was held that a company incorporated in and managed by directors resident in Holland under the German occupation had an enemy character.[1]

Control test.—The 'control' test was applied in the recent Kuenigl Case.[2] In this case the Company which had registered in England but was controlled by German nationals was sued on the basis of an agreement of 1929 with the allegation that the subsequent agreement of 1939 and 1940 were void under the provisions of the Trading with the Enemy Act, 1939. It was argued that the Company having an enemy character was to be considered as a person in Germany and the agreements of 1939 and 1940 could not be held to be void under the English Law. Mc. Nair J., took the view that on the authority of the decision in Daimler Co. Ltd. v. Continental Tyre and Rubber Co. Ltd. the Company had an enemy character but could not on that ground be treated as a person in Germany and despite the acquisition of enemy character remained subject to the provisions of the Trading with the Enemy Act.

It may however, be noted that the 'control' test does not exclude the incorporation test. The 'control' test will apply only when the incorporation test does not apply. A corporation registered in an enemy country will have enemy character notwithstanding the fact that its shareholders and directors are not enemy nationals. Similarly a corporation

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1. (1934) A. C. 203.
2. (1955) I Q. B. 515.

not registered in enemy country, but is controlled by enemy nationals gets enemy character as judged by the 'control' test.

U. S. A. Practice.—Since the passing of the Trading with the Enemy Act of 1917 the practice of United States has been to regard companies to have enemy character if (1) they are incorporated within enemy country, or (2) they are incorporated in any country other than the United States and doing business in an enemy country. It will thus appear that while according to British practice, a company incorporated in Great Britain can under certain conditions assume enemy character, a company incorporated in the United States could not under the practice followed in the First World War acquire enemy character.

In the Second World War the American practice favoured the application of the 'control' test. In some cases corporations registered in the United States of America and having one fourth shareholders of enemy nationality were held to have enemy character.

4. Vessels.–The general rule is that the character of a vessel is determined by the Flag under which it sails. Therefore vessels sailing under enemy flag have enemy character and it makes no difference that its owner is the subject of a neutral State. Another rule is that a vessel owned by an enemy but sailing under a neutral flag does not possess enemy character.

Vessels flying a neutral flag assume enemy character in the following circumstances :—

(1) When a neutral vessel takes direct part in the hostilities by being under the order or control of an agent placed on board by the enemy Government, by being in employment of the enemy or by being exclusively intended for transport of enemy troops ;

(2) When the neutral vessel forcibly resists the legitimate exercise of the right of visit and capture;

(3) According to British, American and Japanese practice when the neutral vessel carries on with the enemy during war, a trade which was not open to it in time of peace.

The effect of neutral vessels assuming enemy character is that all goods on board the vessel will be presumed to be that of the enemy and would be liable to confiscation.

5. **Goods.**–The general rule is that goods belonging to individuals having enemy character possess enemy character. Since there is no uniform rule determining enemy character of an individual, the enemy character of goods depends on the varying practice of States.

British and American Practice.—All goods belonging to persons domiciled in enemy country bears enemy character and goods belonging to persons not residing in enemy country has no enemy character. As a corollary to this rule, goods belonging to subjects of neutral States residing in enemy country is to be regarded as having enemy character. The property of a trading concern established in enemy country by a subject of neutral State not himself residing in enemy country bears enemy character. Also the goods of a trading concern established in a neutral country by an enemy subject do possess enemy character.

French and Continental Practice.—France and many other European States adhere to the principle of nationality in determining the enemy character of goods. According to these States the nationality of the owner of the goods is the deciding factor. Goods belonging to nationals of enemy States have enemy character and it makes no difference if the owner resides in a neutral territory. Thus, goods belonging to subjects of neutral States even though found on enemy vessel do not bear enemy character.

6. **Effect of transfer on enemy character.**—As to whether enemy vessel or enemy goods lose their enemy character on their transfer to a neutral, the unratified Declaration of London offered a satisfactory solution. It is necessary to look at the various provisions of the Declaration on this point as the practice of States to a large extent is in conformity with the rules laid down in it.

Transfer of Vessels.—Articles 55 and 56 of the Declaration lay down that the transfer of a private enemy vessel to a neutral before the outbreak of war is valid unless it is found that the transfer was not bona fide but was made to evade the consequences of its being regarded an enemy vessel. The Declaration lays down two rules of presumption. The first rule is that in case the bill of sale of the enemy vessel to the neutral is not on board the vessel and if the sale was made less than sixty days before the outbreak of war, there will be a presumption which is liable to be rebutted that the

transfer was not bona fide. The other rule is that if a transfer has been made more than thirty days' before the outbreak of war, there will be an absolute presumption of the validity of the transfer provided that the transfer was unconditional, complete and in conformity with the laws of the countries concerned and neither the control of, nor the profits arising from the employment of the vessel remained in same hands as before the transfer.

According to the Declaration of London the transfer of a ship made after the outbreak of the war is void unless it is proved that such transfer was not made in order to avoid capture. In case the transfer was made during a voyage or in a blockaded part or if it was subject to right of repurchase or where the municipal laws relating to the right of flying the flag under which the vessel is sailing, there arises a presumption that the transfer is void. A large number of States followed these rules in practice.

The transfer of public enemy vessel to a neutral is invalid and does not affect the enemy character which such vessel possesses. "A belligerent State cannot deprive the enemy of the right to capture a public ship of the former by its sale in good faith and for a commercial purpose to a neutral purchaser, and even at a time when the vessel is in neutral waters."[1]

Transfer of goods.—The Declaration of London recognized the invalidity of transfer of goods in transit and approved the principle that enemy goods on board an enemy vessel retained their enemy character until they reached their destination in spite of any transfer.

British and American practice is to regard invalid a transfer made after the outbreak of the war of enemy goods in transit if the capture of the vessel took place before the goods passed into actual possession of the neutral buyer. The French practice asserts that a transfer of enemy goods in transit is valid if it is proved to be bona fide.

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1. Hyde—International Law, vol. III p. 2078.

This Convention provides that a neutral State may be entrusted with the protection of the interests of the prisoners of war. The neutral State so entrusted is called the Protecting Power. The Convention also enables impartial humanitarian organisation to undertake the protection of the prisoners of war with the consent of the belligerents. The Protecting Power may whenever the interests of the protected prisoners demand, by good offices try to remove any disagreement between the belligerents. The Protecting Power may arrange a meeting of the representatives of the belligerents on a neutral territory for the settlement of a dispute regarding the application of the Convention.

Prisoners of War are to be treated in accordance with the following rules :—

(1) Prisoners of War must be humanely treated. The detaining power is prohibited to do or omit to do anything which may cause death or endanger the health of a Prisoner of War.

(2) Prisoners of War must be protected from the curiosity, violence, intimidation and insults of the local population. No reprisals are allowed against them.

(3) Women prisoners are to be treated with due regard to their sex.

(4) Prisoners of War are to receive proper medical care free of charge.

(5) Prisoners of War are to be required to give their surnames, first names and ranks, dates of birth and army, regimental, formal or serial numbers. No other information is to be elicited from them. This information must not be extracted by inflicting any physical or mental torture. In case the prisoner refuses to give the above information, the detaining power may restrict the special privilege due to him on account of his rank. Prisoners are not allowed to keep arms but they may keep their badges and decoratives.

(6) Prisoners of War are to be kept in a healthy locality outside the danger zone. All arrangements with regard to their residence and ordinary comforts must be made by the detaining State. They are to be allowed freedom of religion and worship.

(7) Prisoners of War may be required to work. Officers who have become Prisoners of War cannot be compelled to work. Prisoners are to work under suitable conditions and cannot be required to engage in humiliating, unhealthy and dangerous work. They are to be paid a fair working wage.

(8) Prisoners of War are permitted to make complaints about conditions of their captivity to the Protecting Power and they are entitled to full facility for the purpose of communicating with the Protecting Power.

(9) Prisoners of War are entitled to a fair trial in case judicial proceedings are started against them in respect of acts done in violation of International Law. They are entitled to be represented by a counsel.

(10) They may be punished for breaches of discipline.

Appropriation of Enemy Property

Movable Public Enemy Property.—The Hague Regulations permit the appropriation of such movable public enemy property as is directly or indirectly useful for military operations. The occupying belligerent may seize cash, fuels, realisable securities, provisions, stores, cloth, rolling stock of the railways, arms, ammunition and all things that are of use in military operations. But movable property belonging to municipalities, religious, charitable and educational institutions as also movables in hospitals, churches, museums and art galleries cannot be appropriated.

The above rule was recognised by the International Military Tribunal at Nuremburg which found Germany guilty of looting museums, palaces and libraries and of seizure of art treasures, furnitures, textiles and other articles.

It may be noted that a belligerent is entitled to appropriate all movables found on the battlefield irrespective of the question as to whether it is useful in military operations.

Immovable Public Enemy Property.—The immovable public enemy property cannot be appropriated until the annexation of the territory on which it is situated. The occupying belligerent has a right to use such immovable property and may appropriate only the usufructs arising

therefrom. It has, however, no right to appropriate the usufructs of immovable properties belonging to municipalities or of those which are dedicated to religious, charitable and educational institutions. The occupying belligerent may if necessities of war so require, use religious, charitable and educational buildings.

Movable Private Enemy Property.—Article 23 of the Hague Regulations provides for seizure of all kinds of movable property which can serve as war-material or which can be used in transmission of news or transport of goods and persons. The occupying belligerent seizing such private property has an obligation to compensate the owners in respect of such seizures. Works of arts,science and historical monuments are not liable to seizure.

Private property not useful as war material or for transport cannot as a rule be seized. The Hague Regulations prohibit pillage and confiscation of private property. But seizure of such properties under pressing necessities of war is lawful. The decision in the Nuremburg Trial fastened the responsibility for the violation of the rule on the individuals participating in the plunder and loot of private property.

Immovable Private Enemy Property.—Immovable property belonging to private individuals cannot be appropriated by the occupying belligerent. It can, like the immovable public enemy property, be used by the occupying belligerent.

Requisition and Contribution.—International Law recognises the right of the occupying belligerent to requisition and contribution. Articles 49, 51 and 52 of the Hague Regulations provide for these.

Requisition.—The occupying belligerent can require the municipalities as well as the inhabitants of the occupied territory to supply all kinds of articles which are really necessary for the army in occupation. It may also requisition of the inhabitants their services which are needed either for the administration of the occupied territory or for the army in occupation. The requisition either of articles or services cannot be lawfully made for the general needs of the occupying belligerent. The right to requisition services does not entitle the belligerent to compel inhabitants to render services in military operations against their own country. The requisition has to be made by the Military Commander, and must be paid for by the occupying belligerent.

The inhabitants of the occupied territory may also be required to allow quartering of soldiers in their houses, to supply board and lodging to them and to supply fodder for horses. The quartering of soldiers is a special kind of requisition and the inhabitants to whom such requisition is made are to be paid in cash at once or sometimes later.

Contribution.—The occupying belligerent may require municipalities or inhabitants of the occupied territory to supply it with ready money. Contribution can be demanded only for the needs of the army or for administration of the locality. The inhabitants who make contributions are to be granted a receipt evidencing the contribution.

Destruction and Devastation.—The Hague Regulations by Article 23 (g) prohibit destruction of enemy property unless such destruction is imperatively demanded by necessities of war. Destruction of enemy property for the necessities of attack or defence is permissible. Destruction of properties may be imperatively necessary for marching of troops and transport of members of armed forces and military goods and such destruction is lawful. But destruction of works of art or science or religious, charitable or educational buildings is prohibited during military occupation of the territory on which they are situate.

General destruction is as a rule prohibited but imperative necessities of war may permit devastation. It is rare that general devastation is required by imperative necessities of war. Whether or not a general devastation is imperatively necessary depends upon all the circumstances of a particular case. Jodi, the German Chief of the Staff was accused of making an order for general devastation in a port of Norway, and the 'wanton destruction of cities, towns or villages or devastation not justified by military necessity' constituted one of the War Crimes with which the Nazi leaders were charged before the Military Tribunal at Nuremburg.

Assault and Bombardment.—Article 25 of the Hague Regulations prohibit the attack or bombardment, by any means whatsoever, of towns, villages, habitations, buildings which are not defended.

Article 26 of the Hague Regulations requires the Commander to take all steps to notify his intention to resort to bombardment. This provision of notification is intended to enable the inhabitants to leave the place to be bombar-

ded and seek safety elsewhere. The Hague Regulations further require the Commanders to take steps to ensure that no injury or damage is caused to religious, charitable, educational buildings, hospitals and other buildings not used in military operations.

Espionage.—According to the Hague Regulations a spy is a person who when, acting clandestinely or on false pretences, obtains or endeavours to obtain information in the zone or operations of a belligerent with intention of communicating it to the hostile party. A spy is a person who secretly under disguise or by false pretences gathers information and communicates it to the opposite party. "It is action under false pretences as well as under disguise that taints the seeker of information with the character of a spy"[1]

A person guilty of espionage is to be tried by a Court Martial and punished. A spy belonging to the armed forces can only be captured during the act of espionage, and if he manages to escape capture and rejoins his forces he cannot subsequently be captured for that espionage but may be made prisoner of war. But a civilian spy may be captured either during the act of spying or subsequently and may be punished after trial by a Court Martial for espionage.

A spy is an unlawful combatant and is an offender against the law of War.[2]

War Treason.—While International Law permits belligerents to employ spies and traitors in warfare, it condemns the individuals who act as spies and traitors, and authorises the belligerents to punish them. Traitors are those persons whether soldiers or private persons who either voluntarily and gratuitously or on payment of bribe commit such acts within the lines of a belligerent as are harmful to it and favourable to the enemy. Acts of War treason may either be committed within the lines of a belligerent or in an enemy occupied territory. According to Oppenheim the following acts amount to War treason :—

(a) information of any kind given to the enemy ;

(b) voluntary supply of money, provisions, ammunitions and the like to the enemy ;

1. Hyde—International Law, vol. III p. 1863.

2. Exparte Quirin and others 317 U. S. 1.

(c) any voluntary assistance to military operations of enemy such as serving as guide, by opening the door of defended habitation, by repairing of a destructed bridge ;

(d) attempting to induce soldiers to desert, surrender to serve as spies and the like ;

(e) attempting to bribe soldiers and officers in the interest of the enemy and negotiating such a bribe ;

(f) liberation of enemy prisoners of war ;

(g) conspiracy against armed forces or against individual officers ;

(h) wrecking of Military trains, destruction of telegraph and telephone lines and of war material in the interest of enemy ;

(i) intentional false guidance of troops ;

(j) rendering courier of similar service to the enemy.

Ruses of War—International Law permits belligerents to employ ruses of war to mislead the enemy. The Hague Regulations prohibit the improper use of ruses of war. Ruses consist in the employment of deceitful means by a belligerent for the purpose of misleading the enemy. The making of military operations by means of false marches or creation of batteries, the feigning of attacks or fights, the use of feigned signals and bugle-calls, the use of enemy watchward, dissemination of deceitful intelligence are some of the ruses of war.

The Hague Conventions forbid killing or wounding by treachery. The use of national flag of the enemy is forbidden during actual attack. The improper use of ruses amounts to treachery and a belligerent is forbidden to make such a use.

Stratagems are allowed in warfare but not perfidy. Nothing which amounts to breach of good faith is allowed under International Law. The use of truce flags, the feigning of surrender for the purpose of luring the enemy into a trap and the assassination of commanders are acts of prefidy and are not permitted. On the other hand, the bribing of the enemy commander or spy, and the deceitful acts committed in answer to the stratagems employed by the other belligerent are perfectly valid.

Capitulations and Armistices

Capitulations.—"Capitulations are conventions between armed forces of belligerents stipulating the forms of surrender of fortresses and other defended places, or of men of war, or of troops." Capitulations embody military arrangements which the commanders of the belligerents make with regard to surrender of troops, defended locality or of particular theatre of War. Since these arrangements by way of capitulations are made by commanders of the forces they cannot bind belligerent States or their Governments. They are local arrangements which do not affect the conduct of war at large. A capitulation provides for the details of surrender and contains terms agreed to between the parties. According to Hyde the subjects regulated by capitulations are: (a) cessation of hostilities; (b) the fate of the garrison, including those persons who may have assisted them; (c) the disarming of the place and of the defenders ; (d) the turning over of the arms and material, and in a proper case, the locating of the mine, defences etc; (e) the evacuation of and taking possession of the surrendered place; (f) provisions relative to the medical personnel, sick and wounded; (g) provisions for taking the civil government and property of the place, with regard to the peaceful population ; and (h) stipulations with regard to the immediate handing over to the victor of certain forts or places or other similar provisions as a pledge for the fulfilment of the capitulation."[1]

The Hague Regulations ordain that capitulations must be consistent with the rules of military honour and must be scrupulously observed. A breach of the terms of capitulations constitutes a War Crime. If the breach of a Capitulation is under the direction of a belligerent Government it amounts to an international delinquency.

CHAPTER XLV

BELLIGERENT OCCUPATION

Belligerent Occupation.—During war each belligerent tries to occupy the territory belonging to the other belligerent and belligerent occupation constitutes an important success in warfare. When the military forces of a belligerent invade

1. Hyde—International Law, vol. III, pp. 1780–1781.

and take possession for the time being the territory belonging to the other belligerent, the belligerent occupation through military forces is complete. Belligerent occupation may, however, be distinguished from mere invasion which consists in the entrance of military forces into enemy territory. It is also different from annexation after conquest. Title by annexation of a territory by the conqueror becomes complete only after the termination of the war. Belligerent occupation of enemy territory during the continuance of war does not involve transfer of sovereignty of the territory. According to the Hague Regulations a territory is regarded to be in belligerent occupation when it is 'actually placed under the authority of the hostile army.' It is essential that a belligerent occupying the territory of the other belligerent must establish its administration over the occupied territory and exclude administration by the legitimate Government. Unless some sort of administration is established by the occupying belligerent there is no occupation under the law. Belligerent occupation ends as soon as the occupying belligerent forces withdraw or are driven out.

On occupying enemy territory the occupying belligerent becomes subject to certain rights and certain duties under the International Law. In early times when there existed no rules of International Law the belligerent occupant of enemy territory was free to deal with the occupied territory and its inhabitants in any manner it liked. With the growth of International Law this freedom on the part of the belligerent occupant found its limitations. For a long time there existed no distinction between permanent rights exercised by the conqueror annexing enemy territory and the temporary rights of a belligerent in occupation of the enemy territory during war. It was by the middle of the seventeenth century that a distinction between temporary belligerent occupation and acquisition of territory through conquest was drawn. In the period that followed the rules regarding belligerent occupation took definite shape. The Hague Regulations made a clear statement of the law on the subject. After the Second World War the Geneva Convention of 1949 adopted some more rules governing belligerent occupation of enemy territory.

Authority of Belligerent Occupant.—Since belligerent occupation consists in coming of the enemy territory under the authority of the hostile army, the belligerent occupant acquires a temporary right of exercising administration over the occupied territory and its inhabitants. The reason why International Law concedes right to and imposes duties on,

the belligerent occupant is that in the new and peculiar relationship that comes into being by reason of the provisional belligerent occupation between the inhabitants of the occupied territory and the alien ruler it is desirable to prevent the belligerent occupant from being law unto himself and to safeguard the right of the inhabitants of the occupied territory.

Belligerent occupation is provisional in the sense that no transfer of sovereignty takes place, although the de jure sovereign during the period of occupation is prevented from exercising control over the occupied territory. The position of the occupant is that of a temporary possessor of the occupied territory and that he is possessed of certain rights and duties under the International Law. The occupant by reason of his possession for the time being of the territory has a temporary right of administration. It is essentially military administration that is carried on by the occupant. The occupant is free to adopt his own means and procedure of administration and is to be guided by his own judgment, experience and a high sense of justice. The maintenance, security and safety of his own forces and the realisation of purposes of the war are of primary importance to the occupant in the administration of the occupied territory. The occupant has a duty to respect existing laws of the territory, and to take steps to maintain law and order. The Hague Regulations enjoin upon the belligerent occupant to 'take all the measures in his power to restore, and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.

As the executive, legislative and administrative functions of the de jure Government cease on occupation of the belligerent, the occupant enjoys the right of exercising all the governmental functions and is under a duty to restore and ensure public order and safety. The occupant is entitled to discharge the executive functions of a government over the occupied territory and for that end may retain in employment the civil servants of the de jure government or may employ other officers and servants. The occupant unless forced by exigencies of war may not suspend the existing laws and promulgate new laws. In the absence of existing laws the occupant is authorized to promulgate laws for the occupied territory. The occupant has a duty to respect existing laws but he has a right to disregard them whenever they come in conflict with his effort to ensure security of his army and the

success of his military operations. The municipal laws of the occupied territory affecting private rights of person and property and regading punishment of crimes continue in force in so far as they are incompatible with the new order of things and unless they are suspended in their operation by the orders of the belligerent occupant.

Position of Inhabitants of Occupied Territory.—The belligerent occupant has military authority over the territory. This authority though temporary is for all practical purposes effective de facto and the inhabitants are bound to be obedient to that authority. This obedience to the authority of the occupant arises from the Martial Law to which the inhabitants are subject. This obedience to the occupant is however subordinated to the higher duty of obedience to the de jure sovereign and of abstention from assisting the enemy. In view of theses two duties the Hague Regulations lay down that the inhabitants cannot be compelled to join the military forces of the occupant against the de jure sovereign or to disclose information regarding military operations of their de jure sovereign. The inhabitants cannot be forced to take an oath of allegiance to the occupant ruler but they can be compelled to take an oath to abstain from taking up arms against the occupant and from flouting his authority.

The inhabitants may be required to serve as drivers and ferriers ; they may be forced to bury the dead, remove the sick and the wounded, to bring supplies, stores and baggage. The occupant can ask the inhabitants to render service in the repairs of the bridges, roads, buildings and other works damaged by military operations and necessary for the administration of the occupied territory. But on no account can the inhabitants be asked to take part in military operations. Military operations may be distinguished from military preparations. The practice of the belligerents has been to compel inhabitants of the occupied territory to render services in military preparations such as construction of fortifications and trenches in the rear. The Geneva Convention of 1949 prohibits the occupant to compel inhabitants of the occupied territory to serve in its armed or auxiliary forces and to carry on propaganda for voluntary enlistment in his army.

The belligerent occupant has no right to deport the inhabitants outside the occupied territory and compel them to work there. The Germans ruthlessly violated the rule in the Second World War when they deported inhabitants

of occupied terrtitory and forced them to work under conditions of cruelty and suffering. The Military Tribunal at Nuremburg found that at least 5,000,000 workers were deported to serve in German industrial concerns and inhumanely treated. This deportation for forced labour was considered to be a war crime and those who were found guilty of such a crime were punished.

The inhabitants are bound to respect the authority of the occupant and cannot resist the lawful exercise of that authority. They are liable to be punished by the occupant for acts which amount to war treason. Espionage, supplying information to the enemy, damage to railways, war material, telegraphs and other means of communication, aiding prisoners of war to escape; conspiracy against the occupant forces, intentional misleading of troops while acting as guides; inducing soldiers of occupying forces to act as spies for the enemy, to desert or surrender; bribing soldiers in the interests of the enemy; fouling sources of water supply and concealing animals, vehicles, supplies and fuel in the interest of the enemy constitute acts of war treason for which the inhabitants can justly be punished.

Enemy subjects as well as subjects of a neutral State inhabiting the occupied territory are entitled to an equal treatment at the hands of the occupant. None of them are entitled to any compensation for any injury caused to them by legitimate acts of the belligerent occupant. In the administration of the occupied territory the belligerent occupant is under an obligation to respect family honour and rights of the inhabitants and also their religious convictions and practices. The occupant can under no circumstances be permitted to violate the requirements of morality or to ignore the sacredness of the domestic relations. The Hague Regulations require the occupants to respect family honour and religious beliefs of the inhabitants of the occupied territory.

Taxes and other fiscal measures.—In administering the occupied territory the belligerent occupant is entitled to collect taxes, revenues and other dues for defraying the expenses of administration. The occupant enjoys some freedom in the collection of revenues and in spending for the purposes of administration. The Hague Regulations however impose certain restrictions on the power of the occupant by requiring him to collect taxes, dues and tolls "as far as possible in accordance with the rules of assessment and incidence in force and

to be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate government was so bound."

The belligerent occupant is entitled to levy other money contribution for the needs of the army or for the administration of the territory. He may impose duties on imports or other dues the collection of which may be needed for the expenses of administration. He may levy contributions to defray expenses of the army or of the administration. The Hague Regulations permit the levy of money contributions by the occupant only for the needs of the army or of the administration of the territory and not for the purpose of enriching the occupant. If money contributions are levied, the occupant should in proof of his good faith render accounts of the money received by contributions.

The Hague Regulations provide that 'no general penalty, pecuniary or otherwise shall be inflicted upon the popuulation on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.' This provision implies that collective penalty can be imposed by belligerent occupant if the act of the individual is such as can be regarded as the act of the whole community.

The occupant is entitled to demand requisitions in kind and services from the inhabitants of the occupied territory for the needs of the army of occupation. These requisitions are to be 'in proportion to the resources of the country and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.' Requisitions in kind are to be paid for in cash and if they are not paid for in cash, a receipt is to be given and the payment should be made as soon as possible. Under the Hague Regulations every commodity necessary for the maintenance of the army such as fuel, foodstuffs, clothing, tobacco, printing press, type, leather and other such things can be requisitioned.

Dealings with property during occupation.—The belligerent occupant does not enjoy full freedom to deal with property, private or public on the occupied territory. The Hague Regulations have imposed important restrictions on his power to deal with property.

The belligerent occupant has to respect private rights in the property and has no right to confiscate private property.

Pillage or indiscriminate plunder of private property is prohibited. Private property can be seized only for the support or other benefit of the occupying army provided that at the end of war proper compensation is paid or the property is restored. The Hague Regulations while permitting seizure of private property necessary for the use of the occupying army impose an obligation on the occupant to make proper compensation to the private owner.

According to Hague Regulations belligerent occupant can only take possession of cash, funds and realizable securities which are strictly the property of the legitimate government, depot of arms, means of transport, stores and supplies and generally all movable property belonging to the legitimate government which may be used for military operations. This provision authorises the occupant to seize all movable property of the legitimate government which is susceptible of military use public movable property not susceptible of military use may therefore not be seized and must be respected.

The occupant has no right to dispose of public immovable property. His position with respect to immovable property belonging to the legitimate government is that of an administrator and usufructuary. He can make legitimate use of such property and benefit himself from the income or usufruct of such property. He is not permitted to commit any act of waste with regard to it. Immovable properties dedicated to religion, charity and education, historic monuments, works of art and science are to be respected as private property and the occupant is liable to make compensation in case any damage to them is caused by his actions.

The position of the occupant is that of a controller with regard to public funds. The occupant is entitled to collect debts due to the legitimate sovereign and the money thus realized may be utilized for the expenses of the administration. He is not permitted to take fiscal measures for the purpose of enriching himself. He has a right to control banking organisations of the occupied territory, but he must pay due respect to the rights of private individuals in the assets of the banks. Private depositors in banks are entitled to their money and the occupant is under a duty to safeguard their interests.

Hostages.—The Hague Regulations do not prohibit the taking of hostages by belligerent occupant for the purpose of enforcing compliance with legitimate orders of the occupant. "Nor does Article 50 clearly prevent an occupant from taking hostages to safeguard lines of communication threatened by

guerillas not belonging to the armed forces, or for other purposes, provided that he does not kill them, although they may suffer for act or omissions of others for which they are neither legally nor morally responsible."[1] The taking of hostages is a powerful weapon in the hands of the occupant to coerce into obedience an unruly population but it is likely to be abused. "While the taking of hostages by the occupant may, under certain circumstances, operate as a reasonable mode of securing compliance by a restive population with a just demand designed to promote the maintenance of order, occurrences in the course of World War I encourage the conclusion that it is also a weapon likely to be employed by a despot to check interference of any sort with ruthless and cruel acts inspired by caprice."[2] Hostages are generally taken to prevent the commission of unlawful acts by enemy forces or the inhabitants of the occupied territory. The United States Rules of Land Warfare permitted taking hostages for the purpose of protecting lines of communication by placing them on engines of trains in occupied territory and to insure compliance of requisitions and contributions. These Rules further lay down that hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people were to be punished or put to death if the unlawful acts were repeated.

Trade and Commerce of the Occupied Territory.—The belligerent occupant in its position as a de facto administrator of the occupied territory has a right to control the trade and commerce of the occupied territory. He may prohibit commerce from occupied ports or allow on conditions that he may like to impose. He may regulate intercourse and means of communication between the occupied territory and the outside world. He may impose censorship over publications and transmission of intelligence.

Position of Courts During Occupation.—The belligerent occupant is ordained to respect the laws in force in the occupied territory and abstain from declaring extinguished suspended or unenforceable in a court of law rights and the rights of action of the inhabitants. The occupant is thus entitled to establish military courts in place of ordinary courts. He may let the ordinary courts function as before but he may, if military needs and the maintenance of public order and

1. Oppenheim—International Law, vol. II p 443.
2. Hyde—International Law vol. III p. 1902.

safety so requires, change the criminal law and the procedural law. The occupant has a right to disregard eminently unjust laws. The Allied Powers when they occupied Germany as a result of the Second World War ordered elimination of certain Nazi laws which were opposed to principles of justice and equality before the law.

The occupant has no right to require the ordinary courts to pronounce their judgments in his name, though he may not allow them to pronounce verdicts in the name of the legitimate government. He may or may not retain the judges of the legitimate Sovereign, but he must respect their independence.

Position of Officials.—The belligerent occupant may, or may not retain the services of the officials of the legitimate government during his occupation. He cannot force them to discharge their duties if they refuse to serve. He can compel officials to work when military necessity requires him to do so. The officials if they continue in service during occupation may be required to take an oath of obedience but not the oath of allegiance. They cannot be permitted to function in the name of the legitimate government, though they cannot be compelled to function in the name of the occupant. The occupant has a right to appoint new officials during the course of his administration of the occupied territory.

Geneva Convention, 1949.—The atrocities committed by Germany during its occupation of certain enemy territories aroused nations to define and develop the rules governing belligerent occupation nnd the result was the adoption of the Geneva Convention of 1949. The Convention contains important rules for the protection of civilian population during belligerent occupation. Some of the provisions of the Geneva Convention are :—

(1) Individual or mass forcible transfers and deportations of civilians from the occupied territory to outside places are absolutely prohibited.

(2) The occupant is not permitted to compel inhabitants of occupied territory to serve in the armed or auxiliary forces.

(3) No inhabitant of less than 18 years of age can be compelled to work. The work which he can be compelled to do must be necessary either for the needs of the army of

occupation or for the public utility services or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. The inhabitants cannot be forced to engage in military operations or to do work outside the occupied country. The work that the inhabitants may be required to do must be proportionate to their physical and intellectual capacities. The occupant is bound to pay a fair wage for the work.

(4) Destruction of movable or immovable properties of private persons and of the legitimate government is prohibited when not necessary for military operations.

(5) The occupant is entitled to suspend or repeal criminal laws when those laws constitute a threat to his security or an obstacle to the application of this Convention. He may enact new criminal laws for the purpose of ensuring orderly government of the country and the security and the needs of the army of occupation. The new laws so enacted cannot have retrospective operation. The occupant may establish military courts for the administration of such laws.

(6) Inhabitants of the occupied territory are punishable with death penalties only when they are proved guilty of espionage, of serious acts of sabotage or of intentionally causing death provided that such offences were punishable with death before occupation.

(7) No person is to be arrested, prosecuted or punished for offence which were committed before the occupation except for offence for breaches of laws and customs of war.

(8) The civilians accused of offences during occupation are entitled to a regular trial and to a right of appeal.

(9) The occupant is under a duty to ensure supply of food and medical stores and services for the population. He must bring in necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

Occupation of Germany not belligerent.–The termination of the Second World War marked the unconditional surrender by Germany to Allied and Soviet Military Commanders on May 8, 1945. Great Britain, the United States of America, Soviet Russia and France assumed sovereign authority over Germany. The occupation of Germany by the four powers

did not legally amount to belligerent occupation inasmuch as the unconditional surrender by Germany in pursuance of an instrument of surrender signed at Rheims on May 8, 1945 on behalf of the German High Command in the presence of the representatives of the Allied forces amounted in law to more than an armistice. An armistice agreement is one signed by the victor and the defeated laying down the rights and obligations arising thereunder. An instrument of unconditional surrender gives a full and unrestricted authority to the victor and is therefore something greater than an ordinary armistice agreement. It is sometimes said that inasmuch as there had not come into existence an armistice agreement or a Peace Treaty when the Allied Powers occupied Germany, the occupation of Germany was a belligerent occupation subject to the limitations imposed by the Hague Convention and the traditional rules of customary International Law In the first place, the surrender put an end to all hostilities and enabled the assumption of supreme authority by the Allied Powers In the case of Re Orchard it was held that although no armistice agreement in fact was concluded between great Britain and Germany, the unconditional surrender by Germany coupled with acceptance of that surrender by the victors amounted to armistice.[1] In the second place, the relevant provisions of the Hague Convention could not be applied to the situation that had emerged in 1945 when the Allied Powers occupied Germany. Article 43 of the Convention may particularly be noticed in this connection. This article required the occupant to respect the laws in force in the occupied territory. It cannot be denied that the Nazi laws in force at the time of the occupation were in denial of fundamental human rights and were such as shocked the conscience of a civilized right thinking man. The Hague Convention did not contemplate such a situation and the provisions of Article 43 were not possible to be complied with. This being the position, the first proclamation issued by the Military Government established by the Allied Powers declared that "we shall overthrow the Nazi rule, dissolve the Nazi Party and abolish the cruel oppressive and discriminating laws and institutions which the party has created." This was followed by Law No. 1 issued on September 18, 1944 whereby certain oppressive Nazi Laws were declared ineffective and inoprative. A few subsequent Proclamations were made to undo all wrongs done to private persons. Private properties were restored to lawful owners who had been

1. (1948) 1. All. E. R. 203.

wrongfully deprived of them. The Military Government, in pursuance of Potsdam Agreement between the Great Britain, the Soviet Russia and the United States of America, dismantled a number of German industrial works and did all to weaken the economic strength of Germany. In a belligerent occupation all that was done by the Allied Powers in Germany was not possible. These and various other acts of the Allied Powers, though not warranted by the provisions of the Hague Convention and the traditional rules of International Law, were fully justified inasmuch as the unconditional surrender by Germany entitled the Allied Powers to wield supreme authority over the German territory.

Moreover, the unconditional surrender of May 8, 1945 was followed by a Declaration of June 5, 1945 made by the Allied Powers to the effect that they would take "such steps, including the complete disarmament and demilitarisation of Germany, as they deem requisite for future peace and security," conferred on the Allied Powers unlimited and unrestricted power to do what they liked with all the benefits arising from an armistice agreement. In any view of the matter occupation of Germany by the Allied Powers can be regarded as belligrent occupation.

CHAPTER XLVI

LAWS OF MARITIME WARFARE

Attack and Seizure of Ships.—Attack on and seizure of ships belonging to enemy constitute principal means of maritime warfare. Every man of war and public vessels on the open sea or in the territorial waters of either belligerents are to be attacked when they resist a visit by the enemy men of war. The attack on the public or private vessels must be made by men of war. Men of war may be attacked by Coast batteries but not the private vessels. The modern ways of attack are by cannonading torpedoing and by diopping bombs from aircrafts. The attacked vessel is allowed to defend by making a counter attack. During the First World War the Allied powers began the practice of arming their merchantmen for purposes of defence. This led to a lot of controversy inasmuch as many writers maintain that private armed vessels do not lose their legal character while there are writers who are of opinion that by being armed the private vessels lose their immunities.

When a vessel attacking or attacked hauls down its flag indicating surrender she must be given quarter and seized.

Submarine Contact Mines.—The Hague Convention VIII regulates the laying of automatic submarine contact mines. This Convention is now binding on twenty-nine States. Although it declares that it is binding between contracting parties only if all the belligerents are parties to it, it must be deemed to embody rules which are not technically binding but which are valuable and have a persuasive effect. The failure of Russia to accede to it rendered the Convention inapplicable in the World War. Both in the First and the Second World Wars there was complete disregard of the prohibitions of this Convention on the part of Germany which indiscriminately made use of contact mines. This improper action of Germany was met with the establishment of permanent minefields and war zones on the part of the other belligerents. The use of 'electro-magnetic mines' by Germany in the Second World War made navigation of belligerent as well as neutral ships more dangerous. It would therefore appear that technically the law on the subject is still uncertain. Hyde enunciates the principle thus :

"The sowing on the high seas of Submarine mines, whether anchored or unanchored must on principle be normally regarded as a mark of contempt for the right of the neutral to traverse freely these seas, as well as for the duty of the belligerent not to attack without warning unoffending private ships of the enemy in similar places. It ignores the special claims of non-combatants and is indifferent as to their sex or age. The right therefore to employ such devices against vessels of an opposing belligerent would appear to depend in the case of anchored mines, upon the effective and lawful control over the area where they are sown, and upon the sufficiency of the warning given to innocent shipping otherwise exposed to destruction. It would depend in the case of unanchored mines upon the use of weapons of such brief life, and with such scrupulous care, as to render negligible any dangers to be anticipated by unoffending vessels."[1]

The Hague Convention lays down that belligerents must not lay automatic contact mines off the coasts and ports of the enemy with the sole object of intercepting commercial navigation and belligerents should take all possible care to ensure security of peaceful shipping and to render these mines harmless within a limited time. The Convention prohibits laying of unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after those who laid them have lost control of them. It prohibits the laying of anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

Seizing vessels and their effect.—When a belligerent men-of-war seizes a vessel of the enemy it either sends some of its officers or crew on board the seized vessel or directs the seized vessel to lower its flags and to follow it.

On the seizure of a private enemy vessel, the individuals and the goods on the vessel as well as the vessel becomes subject to the authority and the discipline of the capturing belligerent. The crews of the vessel if they commit acts of hostility on being attacked by the capturing men-of-war become prisoners of war.

If the crews without being attacked commit acts of hostility they are treated as criminals. But if the crews are not attacked and if they do not commit acts of hostility they are treated according to Convention XI which lays down the following rules :—

1. Hyde—International Law, vol. III p. 1937.

(i) if the crews are the subject of a neutral State they are not made prisoners of war.

(ii) The captives and officers who are subjects of neutral State are not treated as prisoners of war unless they refuse to give an undertaking that they would not enter the service of the enemy in connection with military operations or the vessel. The seized ship must be brought before the Prize Court which may confirm the seizure and may allow appropriation of the vessel or goods on board the vessel.

In the case of the seizure of public enemy vessel, the capturing belligerent has the right to make immediate appropriation. The seized vessel may either be destroyed or taken into port. All individuals on the vessels are taken as prisoners of war. The cargo is also taken to be confiscated. According to British practice neutral goods on such vessels are also liable to be appropriated but American practice forbids appropriation of neutral goods.

The Hague Convention prohibits seizure of vessels with a religious scientific or philanthropic mission or hospital ships. Similarly the Hague Convention XI declares that vessels employed exclusively in coast fisheries and small boats employed in local trade together with their cargo are exempt from seizure by the belligerent.

Combatants and non-combatants.—The distinction between combatants and non-combatants is also maintained in the law relating to maritime warfare Combatants may be killed but not men that are sick or wounded and those that surrender must be given quarter. All officers and members of the crew must be made prisoners. Members of the crew who are neutral subjects must not be made prisoners.

Non combatants, that is to say, those individuals who do not actually take part in the fight such as members of the medical unit, chaplains and other persons who do not fight are not to be directly attacked, killed or wounded. Individuals who do not belong to the force cannot be attacked directly, killed or wounded.

Treatment of Sick, Wounded and Shipwrecked.—The Geneva Convention of 1949 lays down rules for the treatment of the sick, the wounded and the shipwrecked in naval warfare. These rules are to a great extent similar to those which apply to war on land. The sick, wounded and shipwrecked

individuals are to receive humane treatment. When they fall into the enemy hands they are made prisoners of war and meet such treatment as is given to prisoners. The belligerents have a duty to make a search for the dead, the wounded and the sick and to see that proper arrangement is made for their treatment Hospital-ships, medical transports and medical aircrafts enjoy immunity from captuse or other kind of molestation.

Ruses in Sea Warfare.—Ruses not involving perfidy are allowed in sea warfare as in land warfare. Customary International Law permits the employment of a false flag whether enemy or neutral for the purpose of misleading the enemy. But before the actual attack a vessel must fly its real flag The act of showing signs of distress is not permissible as it involves perfidy and takes the enemy unawares. A good example of the use of ruse in sea war is furnished by the action of *Emden* a German cruiser in the First World War *Emden* hiding her identity by flagging the Japanese flag passed the harbour of Penang in the Malay States. It then came on the Russian Cruiser, Zhemshug and there after lowering the Japanese flag and hoisting the German flag opened fire and torpedoed her[1].

CHAPTER XLVII

LAWS OF AIR WARFARE

The Laws of Air Warfare.—The only rules that existed before the First World War were embodied in the Hague Declaration and the Hague Regulations. A need for a systematic body of rules for aerial warfare was never more felt than during the First World War in which aircraft proved to be a very useful means of warfare both on the land and the sea. The question of regulating the use of aircraft in war was taken up at the Washington Conference of 1922 on the Limitation of Armaments. A Commission of Jurists was appointed by that Conference for formulating rules of Air Warfare. In 1923 the Commission which met at the Hague presented a Code of Air Warfare Rules known as the Hague Air Warfare Rules.

1. Oppenheim—International Law Vol. II (Seventh Ed.) p. 510.

Although these rules have not been ratified and have not so far been incorporated in a multipartite agreement they embody valuable principles on which the Law as to aerial warfare can be safely based. Moreover, States often refer to these rules in their arguments on questions relating to aerial operations.

Many of the rules relating to air warfare are based on analogies drawn from the law of land and sea warfare. The events of the last two world wars have provided good materials from which new rules are deducible. "Where analogies and regulation have failed, moreover, the practice of two world wars, though in a sense abundant in both restraint and excess, chivalry and barbarism, assertion and protest, has also added few binding rules. In no sense but a rhetorical one can there still be said to have emerged a body of intelligible rules of air warfare comparable to the traditional rules of land and sea warfare."[1]

Before the First World War the attacks from the air were not considered to be legitimate and the attackers were regarded as war criminals. During that war the legitimacy of air attacks was recognised. The Second World War brought new experience in air warfare and gave new rules.

Region of air warfare.—The region of air warfare is the same as that of land or sea warfare. Belligerents are entitled to wage air warfare in that region where they are engaged in land or sea warfare. The aerial warfare is fought in superjacent air space by belligerent air-craft. The Allied Powers acted on the principles that the superjacent space over enemy territory was within the region of air warfare. It is however not permissible for belligerent air-craft to penetrate into superjacent air space of a neutral State The practice established by the experiences of the two world wars is that a neutral State is entitled to take measures to seize belligerent air-craft penetrating its subjacent air space and intern them along with their pilot and crew or to shoot them down if necessary.

Some modes of aerial warfare.—In the First World War the belligerents freely resorted to the use of incendiary and explosive projectiles against air-craft. This use of incendiary and explosive projectiles is permitted in aerial warfare under the Air Warfare Rules of 1923, although prohibited in land warfare. In aerial warfare it is not regarded inhuman

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1. **Julius Stone : Legal Controls of International Conflict p. 609.**

to inflict the maximum degree of suffering upon the occupants of an air-craft by the use of incendiary and explosive projectiles. It is permissible for a belligerent in aerial warfare to fire on the enemy air-craft after it has crashed on the ground. It is also not forbidden to shoot down an enemy descending by a parachute from an air-craft. The rule of giving quarter to defenceless enemy in land warfare does not apply to aerial warfare.

Combatants and Non-Combatants in Aerial Warfare.—The method of air warfare is apt to reduce the distinction between combatants and non-combatants as legitimate objects of war. The events of the Second World War gave no protection to the non-combatants in an aerial attack on the enemy. An aerial bombardment directed against combatants may involve danger to non-combatants also. In as much as the results of such an aerial attack cannot be anticipated, non-combatants cannot find protection so long as aerial bombardment is permitted by the rules of International Law. It was for this reason that the General Commission of the Disarmament Conference held in July, 1932 adopted a Resolution recommending the parties to the proposed Disarmament Convention to agree that all bombardment from the air shall be abolished. Notwithstanding the efforts made for the protection of the non-combatants and the Declarations made both by Germany and the United Kingdom and France to the effect that the aerial bombardments would be directed to strictly military objectives and the civil population would be altogether spared; the air attacks during Second World War did not spare the civil population.

Aerial Attack.—The Hague Air Warfare Rules do not prohibit the use of tracer, incendiary or explosive projectiles by or against aircraft. It will thus appear that the use of incendiary and explosive projectiles which is prohibited in land warfare is permissible in aerial warfare. In air warfare an attack on a disabled aircraft or on the individuals with a crashed aircraft is not prohibited. But occupants of disabled aircraft when attempting to escape by means of parachutes must not be attacked in the course of their descent. The principle of immunity of non-combatants from attack applies to aerial warfare as it does to land warfare.

Aerial Bombardment.—Aerial bombardment now occupies an important place in aerial warfare. As a general rule aerial bombardment of undefended place is prohibited. This prohibition is based on another well established rule of exemption of non-combatants. The important rules regarding aerial

bombardment embodied in the Hague Air Warfare Rules may be stated as follows :

(*a*) Aerial bombardment for terrorising the civilians and for destroying and damaging private property of non-military character and for injuring non-combatants is prohibited.

(*b*) Aerial bombardment for enforcing requisition and contribution is prohibited.

(*c*) It is lawful to direct bombardment of military objectives *e. g.* military forces, military works, military workshops, military establishments or depots, factories engaged in the manufacture of arms, ammunition, military supplies, lines of communication or transportation used for military purposes.

(*d*) Bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. Even military objectives which are so near cities, towns and villages, dwellings or buildings that it would be impossible to bombard them without injuring civil population are not to be bombarded.

(*e*) Buildings dedicated to public worship, art, science of charitable purposes, historic monuments, hospital-ships are not to be bombarded.

The Assembly of the League of Nations in 1938 adopted a resolution whereby three principles enunciated by the British Delegation were accepted :—

(1) Deliberate bombardment of civil population is unlawful.

(2) Targets which are aimed at from the air must be legitimate military objectives and must be capable of identification.

(3) Reasonable care must be taken in attacking military objectives so that by carelessness a civil population in the neighbourhood may not be bombarded.

It is of immense importance that aerial bombardment may be so directed as not to endanger the civil population. In the Second World War while it was recognised that aerial bombardment was an effective means of air warfare it was declared by Great Britain and other States that aerial bombardment was to be directed against 'strict military objec-

tives in the narrowest sense of the word' and that civil population was to be saved at any cost. Germany too agreed to this principle but her indiscriminate air bombing of Warsaw clearly showed that she could not adhere to this policy. Retaliatory measures taken up by Great Britain led her also to deviate from this rule and she did not confine her aerial bombardment only to 'strict military objectives in the narrow sense of the word.' *Lauterpacht* writing about this aspect of bombardment observes : "However that may be, the practice of the Second World War reduced to the vanishing point the protection of the civilian population from aerial bombardment."

Attack and Capture of Civil Aircraft.—The Hague Air Warfare Rules permit 'the firing of belligerent non-military aircrafts unless they make the nearest available landing on the approach of enemy military aircraft.' The Hague Rules further permit firing upon civil aircraft which fly within the enemy territory or in the immediate vicinity of the military operations of the enemy either on land or sea.

Enemy civil aircraft and goods carried by them are liable to be captured. The practice of several States including Great Britain recognises this rule of capture.

CHAPTER XLVIII

PRIZE COURTS

Prize Courts—Prize consists in property such as ships, goods and other articles captured *jure belli* on sea or foreign port or captured on land by naval forces while Courts existing for deciding cases of prizes are called Prize Courts. Prize Courts are established for the determination of the validity of maritime captures during war. "With the aid of its prize courts a belligerent fulfils its obligation to neutral States and their nationals to adjudicate as to propriety of the seizure of vessels and cargoes in which they claim an interest and as to the right to appropriate what has been captured."[1] A belligerent who captures vessels or cargoe s

1. Hyde—International Law, Vol. III, p. 2363.

does so on mere suspicion and it is necessary in all fairness that its right to appropriate the prize must be adjudicated upon by a court of law before which the captor as well as the owner of the captured cargo or vessel or both are entitled to put forward their respective cases. International Law imposes a duty on belligerents to establish prize courts and to bring the cases of their maritime captures before such courts for trial and adjudication. The end in view in establishing prize courts is to get an authoritative pronouncement of a court of law on the validity or otherwise of the maritime captures.

Prize Courts discharge an important function inasmuch as they provide for an authority which is competent to adjudicate upon the acts of maritime seizures of the belligerent and upon the rights of the persons aggrieved by such seizures. Every belligerent is under a duty to establish a prize court and to submit to its jurisdiction. "It follows that but for the existence of Courts of Prizes no one aggrieved by the acts of a belligerent Power in time of war could obtain redress otherwise than through diplomatic channel and at the risk of disturbing international amity. An appropriate remedy is however provided by the fact that, according to International Law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to mnuicipal law—a law which is theoretically the same, whether the court which administers it is constituted under the municipal law of the belligerent Power or of the sovereign of the person aggrieved, and is equally binding on both parties to the litigation."[1] All maritime States have either permanent prize courts or such prize courts as are established during a particular war.

Nature of Prize Courts.—Prize Courts are National Courts deriving their jurisdiction from the laws of a State and they are not international courts. In the case of the *Zamora* the Privy Council held that the British Prize Courts were municipal courts and that their decrees and orders owed their validity to municipal law.[1] *Hyde* observes that "the power of a particular court to exercise jurisdiction in a prize case depends upon the local laws, and in the United States, upon the Constitution and the appropriate acts of the Congress.

1. The Zamora, (1916) 2 A. C. 77.

Although Prize Courts are National Courts they have an international character inasmuch as they determine the question whether the capturing belligerent or the neutral State have acted according to the rules of International Law and they are open to all persons irrespective of their nationality having an interest in the captured vessel or goods. Prize Courts though national in the sense that they owe their existence to municipal law are different from ordinary municipal courts. *Wheaton* observes : "The ordinary municipal tribunals acquire jurisdiction over the person or property of a foreigner by his consent, either expressed by his voluntary bringing the suit or implied by the fact of his bringing his person or property within the territory. But when courts of prize exercise their jurisdiction over vessels captured at sea, the property of foreigners is brought by force within the territory of the State by which those tribunals are constituted."[1]

Jurisdiction of Prize Courts. The jurisdiction of the prize courts is derived from the belligerent State which establishes it. The jurisdiction that such courts exercise is conferred by the municipal laws of the State which creates them. The British Prize Courts during the two World Wars were authorised to take cognizance and judicially to proceed upon all and all manner of captures, seizures, prizes, and refusals of all ships, vessels and goods that were taken and hear and determine the same They were directed to adjudge and condemn according to the course of Admiralty and the law of nations all such ships, vessels and goods as shall belong to the German Empire or the citizens or subjects thereof or to any other persons inhabiting within any of the countries, territories or dominions of the said German Empire brought before them for trial and condemnation. According to British practice British Prize Courts are entitled to condemn merchantmen of an ally which have been found guilty of trading with the enemy.

Prize Courts are required to adjudicate upon all maritime captures. The Prize Court has exclusive jurisdiction to try all cases arising from the act of seizure of a belligerent. Not only has the prize court to determine about the validity of a capture but also other incidental questions. A prize court has jurisdiction to decide all captures *jure belli* and torts connected with such captures. Questions about freight, damages, expenses and costs in all the cases of captures brought before the court are to be decided by prize courts. "And the prize court

1. Wheaton—Elements of International Law p. 674.

will not only entertain suits for restitution and damages in case of wrongful capture, and award damages therefor ; but it will also allow damages for all personal torts and that upon a proper case laid before the Court as a mere incident to the possession of the principal cause. And in such a case it will not confine itself to the actual wrong—doer but will apply the rule of respondeat superior and decree damages against the owners of the offending privateer and where the captured crew have been grossly ill-treated, the Court will award a liberal recompense."[1]

The prize courts are competent to decide the case of a prize which is brought within the area of their jurisdiction. They have, as a rule, no jurisdiction to entertain a case about a prize which is not brought to a port within their jurisdiction. According to British and American practice prize courts are also entitled to adjudicate upon a case of a prize which lies at a neutral port so long as it is under the control of the belligerent captor and with regard to which no case in any other prize court is proceeding. A case relating to a prize coming within the jurisdiction of a prize court continues to be triable by it even though the prize has been lost or destroyed or sold by the captor. Abandonment of a prize by the captor in a neutral port excludes the jurisdiction of a prize court.

Seat of the Prize Courts.—It is now universally recognised that a belligerent can establish prize courts either in its territories or in the territories of its allies or in the territory occupied by its armed forces and that in no case can a prize court be established on a neutral territory. The duty of impartiality demands of neutral State not to permit the establishment of a prize court on its territory. The permission by a neutral State to a belligerent to establish a prize court on its territory would under International Law constitute a breach of neutrality.

Procedure of the Prize Courts.—International Law does not contain rules of procedure which prize courts have to follow. Since prize courts are established by belligerent States, they are bound to follow the procedure laid down by enactments to which they owe their existence. Every State which is under a duty to establish prize courts has a right to prescribe the procedure of its prize courts. No unanimity on the matter of procedure among the prize courts of various States can thus be expected.

1. Story in his Notes on the Principles and Practice of Prize Courts.

"The procedure established in the prize courts of the United States is based upon rules obtaining in the British Courts long before the American Revolution. These rules were the product of the civil rather than the common law. Neutral claimants were protected by close restrictions respecting the nature of evidence and the mode of its presentation Proceedings were in the nature of an inquisition conducted by the State of the captor itself, in order to ascertain whether captured property should be condemned."[1] In the case of the *Adeline* the procedure of prize courts was described thus :[2]

"When the prize is brought within the custody of the court, notice is given to all the world, that any person having an interest in the prize may appear and claim it. This is, of course, though not in terms, confined to citizens or neutrals. An enemy cannot make claim. If the property is ostensibly not hostile, it is usually claimed by the master or supercargo, or in their absence by the consul of the neutral The claim is simply a statement of the nature and extent of the claimant's property and a denial of all enemy's interest supported by an oath, called the test affidavit. The affidavit is required to declare that the claimant has property and right of possession solely for himself, and to disclaim or disclose all fiduciary or other interests behind him. The object of this is not only to disclaim hostile interest but to enable the court to learn who are the real, ultimate and equitable as well as the ostensible and legal owners. There is nothing in the nature of what are technically called pleadings—*i. e.* allegations and denial or admissions of facts—*inter partes.* The captors or the government in their libel make no allegation of any fact necessary to condemn the property or even of the cause of capture. The libel is only a petition to the court to hold its inquest for the purpose of ascertaining the facts, and whether there are any objections to condemnation ; and should property contain only a description of the prize with dates etc., for identification and the fact that it was taken as prize of war by the cruiser and brought to the court for adjudication—*i. e.* of facts enough to show that it is a maritime cause of prize jurisdiction and not a case of municipal penalty or forfeiture". In the matter of *S. S. "Prins Knud"* and her cargo the Privy Council observes that prize is not a civil or marine cause and that in approaching questions of prize law the principles of the common law or of the maritime law which later was founded upon the civil law

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1. Hyde—International Law Vol. III p. 2377.
2. 9 Cranch 244.

are not to be regarded as governing in the prize court.[1] *Oppenheim* observes : "The procedure in prize courts cannot be compared with the procedure in civil or criminal courts, for in prize courts the burden of proof is in practice everywhere laid upon the owner of the captured vessel or cargo."[2]

In the case of the *Kim* it is laid down that prize courts are not governed or limited by the strict rules of evidence which bind and sometimes unduly fetter our municipal courts.[3] It is well established that in prize cases it is the owner of the captured vessels or goods who has to satisfy the conscience of the court and it is upon him that the burden of proof lies. It is for the owner claimant to show by affirmative evidence,that they have the title to the property and that the facts are such that there is no cause to justify condemnation. "The analogy of the English Criminal Law that a man is presumed to be innocent until he is proved guilty cannot be applied in these cases for many reasons. One is that it is not a criminal offence for a neutral to carry contraband, though the goods may suffer the penalty of confiscation. The other is that Prize Courts have adopted their own rules. The claimant is not a prisoner on his trial, but a party who appears to establish his own case that the goods should be released to him After all the claimant who knows the true facts is the person who can dissipate the suspicion, if circumstances are such that he can do so. If he is to succeed in his claim it is for him to satisfy the court."[4]

The evidence, in the first instance, must come from the ships' papers and crew of the captured ship. The ships' papers, the goods and officers and seamen of the captured vessels are examined. If the evidence furnished by the ships' papers and the statements of the officers and seamen of the captured vessel is not clear to condemn the capture, the court is entitled to call for further evidence. The court hears arguments and proceeds to give its decision.

The British practice is not to apply the bar of limitation in prize cases, although British Prize courts are entitled to refuse to hear and determine a prize case brought after undue delay.

Law applied by Prize Courts.—"A prize court created and maintained by a single territorial Sovereign is necessarily

1 (1942) A. C. 667 : A. I. R. 1943 (P.C.) 54.
2 Oppenheim—International Law Vol. II (Seventh Ed.) p. 871.
3 The Kim (1915), p. 215
4. In the matter of part cargo ex S. S. "Monte Contes" (1943) 60 T. L. R. 57.

a domestic tribunal. The law enunciated and applied, regardless of its nature or origin, is essentially the local law, because it obtains where the court sits. Inasmuch, however, as the problems for adjudication, such as the question of prize or no prize, concern the lawfulness of acts committed on the high seas under belligerent flags, and affect the rights of foreign States and their nationals the court must be guided by the principles of the law of nations, if its conclusions are to be heeded abroad."[1] In the case of the *Zamora* it was held that the law which prize courts administer is not the national or the municipal law but the law of nations.[2] In this case it was observed :—"The law it enforces may, therefore, in one sense, be considered a branch of municipal law Nevertheless, the distinction between municipal and International Law is well defined. A court which administers municipal law is bound by and gives effect to the law as laid down by the Sovereign State which calls it into being. It need enquire only what that law is but a court which administers International Law must ascertain and give effect to a law which is not laid down by any particular State but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a court of prize in this country is bound by and gives effect to orders of the King in Council purporting to prescribe or alter the International Law, it is administering not international but municipal law ; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominion who is not the King's subject." It was further observed in this case that a British Prize Court would, in giving effect to an Act of Imperial Legislature the provisions of which are inconsistent with the International Law, no longer be administering International Law and would be deprived of its proper function as a Prize Court.

In order that the decision of a prize court may be respected by foreign powers it is necessary that it should be rendered in accordance with the recognised principles of International Law. As already stated no modern State can ignore recognised rules of International Law and can enact laws inconsistent with International Law. The municipal laws by which prize courts of a State are bound are, as a rule, in accordance with the rules of International Law

1. Hyde—International Law Vol. III p. 2369.
2. The Zamora (1916) 2 A. C. 77.

and there is hardly any ground to suppose that the prize courts in giving effect to the municipal laws of their States would not decide a prize case according to International Law.

Lord Stowell in the case of the *Recovery* observed thus[1] :—

"It is to be recollected that this is a court of the law of nations, sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own ; and what foreigners have a right to demand from it is the administration of the Law of Nations simply, exclusively of the introduction of principles borrowed from our own municipal jurisprudence." Lord Mansfield in *Lindo* vs. *Rodeney* observed that the whole system of litigation and jurisprudence in the prize court was peculiar to itself and that the prize courts of every country were governed by one and the same Law of Nations equally known to each.[2]

In the matter of *S. S. "Prins Knud"* the Privy Council held that the law administered in a Prize Court is thus not the law of the country in which it is situated but the law of nations.[3] The British and American prize courts in the absence of express instructions to the contrary are governed by International Law and practice of nations.

Conduct of the prize.—International Law requires that the captured ship should be taken straight to a convenient port for adjudication. In case the prize is in distress or is not in a condition to be taken straight for adjudication it may be taken to a neutral port provided the neutral state permits. If the captured vessel becomes after Some time fit to be taken to a belligerent port for adjudication it must be taken there but if it is impossible for the vessel to be taken to a belligerent port, the prize court is entitled to hear and determine its case without the presence of the vessel within belligerent territory.

It is the captor's duty to take the captured vessel to the port for adjudication. The captor may get assistance from the officers or crew of the captured vessel. The officers and the crew are free to refuse to assist the captor. The crew and the goods are to remain on board the captured vessel till it reaches the port of adjudication. If the goods are in a condition which prevents them from being sent to the port of adjudication they may be destroyed or be sold.

1. 6 Rob. 341 at p. 349.
2. Doughlas 594.
3. A. I. R. 1953 (P. C.) 54.

In case they are sold the sale proceeds are to be sent to the prize court seized of the matter.

Destruction of the enemy prize.—No unanimity exists among States as to the destruction of a prize by a captor. The general rule is that captured vessel must not be destroyed before adjudication by a prize court for it is through the decision of a prize court that the enemy vessels captured by belligerents become liable to appropriation by the belligerents. Some States follow the practice of destroying the captured vessel in case of imperative necessity only while others allow destruction when it suits their convenience. The American practice during war with England in 1812 was to destroy all captured vessels with the exception of valuable vessels. During the civil war America ordered destruction of all enemy prizes. According to the British practice the destruction is permissible only when the prize is in a condition in which it is not possible to send it to a port of adjudication or when the capturing vessel is unable to spare a prize crew to navigate the prize into a port of adjudication. In all cases of destruction the crew is to be removed, the ship's papers are to be secured and the goods on board the vessels, if possible be taken out for sending to the prize court.

In case the destruction of the vessel is lawful and it was not possible to preserve the cargo, the neutral owner of the cargo is entitled to claim compensation for the cargo. The French Prize Court refused to allow compensation to the neutral owners of some of the cargo on board the *Ludwing* and *Vor Wurts* German vessels which had been destroyed by the French cruiser on October 21, 1870 on the ground that she could not spare the prize crew to navigate the vessel to the port of adjudication. During the First World War the Hamburg Prize Court refused to grant compensation to the Norwegian owners for the cargo on board the English vessel *Glitra* which had been sunk by Germany.

The destruction of prizes by submarines is another important feature of the modern wars. It is generally recognised that the submarines must not destroy the captured vessels. The First World War witnessed destruction of vessels by German submarines either without notice or simply on a very short notice to the crew to leave the vessel with the result that a large number of valuable human lives was lost. The London Naval Treaty of 1930 between the United States, Great Britain, France, Italy and Japan in its Article 22 laid down that submarines in their action with regard to merchant ships were to

act in conformity with the rules which govern surface vessels and that "except in case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search a warship whether surface vessel or submarine may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of custody." Thereafter a Protocol relating to destruction by submarines embodying the provisions of the London Naval Treaty was signed in 1936. To this Protocol States other than those which had signed the London Naval Treaty became parties. All this however had no effect on the German belligerent in the Second World War for submarines were throughout engaged in destroying enemy as well as neutral merchantships. The Nuremburg Tribunal found that Germany sank vessels without warning and thereby violated the rules of the London Naval Treaty of 1930 as also the rules of the Protocol of 1936.

Capture and trial of neutral vessels.—Enemy vessels are captured by belligerents for the purpose of appropriating them along with enemy goods thereon. Neutral vessels are captured by way of punishment, as belligerents have no right to capture neutral vessels for appropriation. As already stated the officers and crew of a captured neutral vessel do not become prisoners of war After capture the neutral vessel is to be taken to the port for a trial by a prize court.

Destruction of Neutral prizes.—It is universally recognised that neutral vessels captured by belligerents are neither to be destroyed nor sunk. Some States have brought out exceptions to this rule. The British practice favours the view that a neutral prize must not be destroyed at all and that if it is destroyed the captor is liable to make good the full loss to the neutral owner. According to the British practice the prize should be abandoned if it cannot be taken to the prize court.

The Declaration of London however permits destruction of neutral vessel liable to condemnation on the ground that the taking of the vessel into a port of the prize court would involve danger to the safety of the capturing vessel or to the success of the operations in which the capturing vessel was at the time of the capture involved. The Declaration clearly provided that if a neutral captured vessel was not liable to confiscation it was neither to be destroyed nor sunk and that it was to be abandoned if it could not be carried to a port of the prize court. The Declaration further provides that if the vessel was destroyed

unlawfully the captor was liable to pay compensation to the owner.

Loss of the Prize.—The prize is lost when the captured vessel escapes, when the captor abandons it or when she is recaptured. When the prize is lost in any one of the above ways the belligerent captor loses its rights. When the captured vessel escapes the rights of the original owner revive.

International Prize Court.—The verdict of a prize court if unjust and not in accordance with the rules of International Law can give rise to claim and protests through diplomatic channel. "The right of the State to which the captors belong to judge exclusively is not a complete jurisdiction. The captors who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous because it has a complete jurisdiction over their persons. But the other parties to the controversy as they are members of another State are only bound to submit to its sentence so far as this sentence is aggreeable to the law of nations or to particlar treaties ; because it has no jurisdiction over them either in respect of their persons, or of the things that are the subject of controversy. If justice therefore is not done to them they may apply to their own State for a remedy ; which may consistently with the law of nation give them a remedy, either by solemn war or reprisals."[1] Though the foreign State at the present day is forbidden to go to a solemn war it can make diplomatic protests in order to afford remedy to its subjects.

The Hague Conference of 1907 made deliberations on the advisability of establishing an International Prize Court for the purpose of satisfying all the parties concerned in a prize case. A Convention known as Hague Convention XII was adopted for creating an International Prize Court It was also considered necessary to have a body of prize law on agreement with the various States. A Naval Conference for the purpose of laying down law for the guidance of the proposed International Prize Court met at London in 1908 and 1909 and produced the famous Declaration of London. This is unfortunate that the Declaration of London was not ratified and thus the proposal for the establishment of an International Prize Court failed.

That an International Prize Court is needed cannot be doubted. The difficulty that lies in the way of the establish-

1. Rutherforth's Inst. Vol. II b. ii Ch. 9 Section 12.

lishment of such a court is the absence of an agreed code of prize law. Unless the various States meet to draw up a complete law governing prize cases, it is not possible to have an uniform prize law. The existing prize law which can be gathered from the practice of various States, writings of jurists and the decisions of the prize courts of the world must be studied and a complete code based upon agreement of the States should be prepared. If this is done, an International Prize Court may easily be established.

CHAPTER XLIX

REPRISALS AND OTHER MEANS

Legitimate Warfare.—How secured?—That there are laws regulating the proper conduct of proper warfare implies the existence of some means whereby the observance of these laws can be secured. When a belligerent conducts warfare in defiance of the laws of war, the other belligerent has a right to adopt methods recognised by International Law to prevent further breaches of the law and to get redress for the wrongs already committed. The methods whereby a belligerent may prevent the continuation or recurrence of further violations of the laws of war and may claim reparations of the wrongs already done are :—

1. **Reprisals.**—Reprisals during a state of war are different from those which are resorted to in time of peace. Reprisals as a measure of self-help have an ancient origin and constitute a form of retaliation against a violation committed by an opponent. The special Arbitral Tribunal in the Naulilaa Incident define reprisals as act of self-help by the injured State in retaliation for acts contrary to International Law on the part of the offending State, which remained unredressed after a demand for amends.[1] According to *Oppenheim* "reprisals in time of war occur when one belligerent retaliates upon another by means of otherwise illegitimate acts of warfare, in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare and to comply in future with the rules of legitimate warfare.'"[2] This method of retaliation can be

1. The Naulilaa Incident (1928) 2 Reports of International Arbitral Award p, 1012.

2. Oppenheim—International Law Vol. II (Seventh Edition) p. 561.

resorted to only when the other belligerent has committed acts contrary to International Law. Reprisals aim at compelling the offending State to make reparation for the offence committed, the return to legality and prevention of future violations.

It may be noticed that the act constituting a reprisal is itself contrary to International Law but that it is justified on the ground that it was provoked by an act equally contrary to law committed by the other belligerent. Reprisals are therefore to be directed only against the offending State and the duty of a belligerent resorting to reprisals is to take all possible care not to injure innocent subjects of a neutral State. But under the law the neutral State cannot complain if reprisals legitimately resorted to by a belligerent cause an indirect injury to them. In the case of *'The Stigstad'* the Privy Council affirmed the principle that 'neutrals may by the law of nations be required to submit to inconvenience from the act of a belligerent power, greater in degree than would be justified had no just cause for retaliation arizen."[1] Non-combatants too cannot claim exemption or immunity from injury by reprisals.

The method of retaliation need not be identical with that of the offence either in character or in degree. The reprisals may be disproportionate to the offence. The experiences of the two World Wars clearly show that acts of reprisal were excessive as compared with the precedent act of illegitimate warfare.

Reprisals are not generally resorted to before a complaint in respect of the act contrary to law has been first made to the offending state or the neutral states. It is only when the violation of the rules of warfare is very grave and the safety of the troops requires prompt and drastic measures that a reprisal will be resorted to at once without making grievance of the precedent act of illegitimate warfare.

2. Taking of Hostages.—The practice of taking as hostages enemy individuals for the purpose of preventing acts contrary to International Law still exists. The modern attitude with regard to this method of retailation is to resort to this procedure for the purpose of ensuring proper treatment of the wounded and the sick when left behind in hostile localities, for protection of the lives of the prisoners whose lives have been threatened, for securing compliance with

1. The Stigstad—(1919) A. C. 279=A. I. R. 1919 P.C. 195.

requisitions and contributions and for the protection of lines of communication in occupied territory and for other similar things. Taking of hostages is resorted to by a belligerent occupant as well as by an army in the field. What is done is that certain enemy individuals of importance are taken in custody of the belligerent in order to bring pressure on the enemy and its citizens to forbear committing illegitimate acts of warfare. The Geneva Convention of 1949 prohibited the taking of hostages.

In the First World War the pratice of taking hostages was much abused. Germany on the occupation of Belgium in 1914 took hostages and killed them whenever she believed her troops were fired upon by civilians of the occupied territory. The Second World War saw greater abuses in the practice of taking hostages. The International Military Tribunal found that Germany resorted to the practice of keeping hostages to prevent and to punish any form of civil disorder. It further found that she was guilty of killing hostages on a wide scale.

3. **Punishment of War Crimes.**—Acts committed in defiance of the laws of war by members of armed forces and other individuals amount to war crimes. Those who are guilty of war crimes if captured by the enemy are liable to be punished. The dread of punishment acts as a check to violations of laws of war and secures in some measure legitimate warfare. *Oppenheim* defines war crimes as 'such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders.'

An individual guilty of war crime cannot plead in defence that he committed the offence under the orders of his Government or his superior officer. Article 8 of the Charter of the International Military Tribunal of 1945 expressly laid down that 'the fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determine the justice so requires.'

The superior officers are also guilty of those war crimes which have been committed by their subordinates under their orders. They are also guilty if they failed to take proper steps to prevent their subordinates from committing acts constituting war crimes.

The *Nuremburg Trial* of the Nazi leaders by the International Military Tribunals as well as other trials for war crimes before

tribunals established by various Allied States after the conclusion of the Second World War have contributed to the development of the law relating to war crimes.

4. **Complaints and mediation**.—Legitimate warfare can be secured by protests made against illegitimate acts of warfare or by mediation and good offices of neutral States. A belligerent can complain to the other belligerent of its illegitimate acts of warfare. It can also make a complaint to the neutral State with a request to lend its good offices or mediation for the purpose of persuading the offending belligerent to return to legitimate warfare. When the complaints are made to the offending belligerent itself they are made under a flag of truce. In case of minor violations of laws of war committed by the armed forces of the enemy, the commander of the belligerent forces frequently makes complaints to the commander of the offending belligerent forces and such complaints often bear good results. The mediation and good offices of the neutral State also often result in preventing illegitimate warfare.

5. **Compensation**.—The Hague Regulation lays down that a belligerent party who violates the provisions of the said Regulations shall, if the case demands, be liable to make compensation and that a belligerent is responsible for all acts committed by persons forming part of its armed forces. The remedy of the injured belligerent by way of compensation indirectly helps in securing legitimate warfare.

Treaties of peace often provide for compensation to the victor by the vanquished for all acts of ilegitimate warfare. At the end of the Second World War Germany was required to make reparations to the Allies. Under Article 232 of the Treaty Germany undertook to make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of belligerency.

CHAPTER L

TERMINATION OF WAR

Modes of Termination of War.—History of international relations shows that wars have terminated in a number of different ways. *Cessation* of hostilities have in a number of cases marked the termination of war. Whether or not cessation of

hostilities can be regarded as a mode of termination of war is not easy to answer. When hostilities merely cease, one is in doubt as to the future intention of the contestants and it is difficult to conclude that war has come to an end and that peace has returned. Suspension of hostilities for a long time accompanied by withdrawal of troops from hostile territory may lead to an inference of restoration of peace and the close of war. But this mode of termination is uncertain inasmuch as it is not known what period of suspension is necessary to give rise to a presumption that war has come to an end. "Difficulties due to uncertainty as to the nature of the relationship prevailing between the opposing States during the interval immediately succeeding such cessation and withdrawal, suffice to render the procedure inadequate. Belligerent powers do not appear to be content to terminate their conflicts by such method."[1] *Oppenheim* is of the view that termination of war through simple cessation of hostilities is very inconvenient and is, as a rule, avoided and that cessation of hostilities does not mark the formal termination of war.

Another mode of termination of war which history supports is by subjugation. Subjugation as a mode of termination of war has been defined by *Oppenheim* to mean "extermination in war of one belligerent by another through annexation of former's territory after conquest, the enemy force having been annihilated." In order that war may end by subjugation it is necessary that one belligerent should take possession of the territory of the other belligerent, annex the conquered tertitory and annihilate the enemy forces. If after subjugation the conqueror comes to terms with the defeated State and enters into a peace treaty with him, the treaty of peace marks the termination of war. But after having subjugated the enemy territory, if the conqueror has no intention to enter into agreement with the vanquished, the subjugation ends the war. There have been in the past numerous cases in which wars have come to end by subjugation. The Kingdom of Hanover, the Dukedom of Nassau, the Electorate of Hesse-Cassel were subjugated by Prussia ; the Orange Free State and the South African Republic were annexed by Great Britain in 1900 ; Abyssinia was annexed by Italy in 1936.

Subjugation may be temporary and may not end war. The Allied forces assumed full authority over Germany in 1945, after completely defeating the German forces and displacing the Nazi Government. The Nazi Sovereignty was wholly

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1. Hyde.—International Law Vol. III p. 2385.

suspended and the subjugation of Germany though complete did not mark the end of war inasmuch as the victors had no intention of annexing the territory permanently. The war terminated on the execution of an instrument of unconditional surrender by the German High Command on May 8, 1945.

The normal end of a modern war is the conclusion of a treaty of peace between the opposing States. The treaty of peace is a common mode of termination of war. This was the mode by which the two World Wars came to end. As a general rule when the parties to a war desire to enter into a treaty of peace they conclude armistices before entering into formal negotiations. These armistices which have been fully dealt with below provide for temporary suspension of hostilities. Negotiations which precede the peace treaty do not formally cause hostilities to cease. It frequently happens that before the treaty of peace is finalised belligerents draw up a document known as 'preliminaries of peace' which embody an agreement between the parties as to the terms of peace and which forms a basis for the definitive treaty of peace. "The words 'preliminaries of peace' or their equivalent have long been employed, however, to describe provisional compacts setting forth the basis of definitive treaties remaining to be concluded and making arrangement for their negotiation." The preliminaries of peace is itself a treaty though tentative in nature and is binding on parties. The conclusion of preliminaries of of peace marks the end of hostilities. Peace is restored on the signing of the peace treaty. Sometimes peace treaties specify a date of the commencement of peace.

Armistices.—The Hague Regulations define armistices as agreements for temporary suspension of military operations. These agreements which are entered into by belligerents do not bring about conditions of peace but aim at a respite from hostilities. Armistices do not put an end to the State of war.

Three important kinds of armistices are :—

1. **Suspensions of Arms.**—This term implies brief suspension of hostilities agreed to between local commanders of the belligerents for a number of purposes such as burial of the dead or the removal of the wounded and the the sick. *Oppenheim* defines suspension of arms as "cessation of hostilities agreed upon between military and naval forces, large or small, for a very short time, and regarding momentary and local military purposes only." Suspensions of Arms have

a local colour and operate with regard to a particular place and particular force.

2. **General Armistice.**—This kind of armistice is an agreement between belligerents for the purpose of suspending hostilities wiih respect to the whole region of War. General armistices having the effect of temporary stopping the whole War bear a political character, and are made for various reasons. They may be concluded by the belligerent Governments or their commanders-in-Chief.

3. **Partial Armistice.**—A partial armistice is an agreement whereby hostilities between certain fractions of the belligerent armies and within a fixed radius are suspended temporarily. Partial armistices have a partial character and have no momentary purpose as in the case of suspensions of arms. They are concluded by Commanders-in-Chief of the bellegirent forces.

The armistices mention the terms and the time of their operation. Suspensions of arms may be oral while the other forms of armistices are to be in writing.

International Law requires that parties should not obscure the terms of the armistices and should not violate them. A violation of the armistices under the orders of a belligerent amounts to an international delinquency. The injured belligerent in case of violation of armistice may either denounce the violation or may, if necessity demands, recommence hostility at once.

Acts permissible during armistices.—The State of War in existence between the belligerents remains unaffected by the conclusion of an armistice. According to Grotius a belligerent commits no violation of the armistice if it performs such acts as erection of defences, the repair of fortification, and the concentration or withdrawal of troops within the area of armistice. There is a view which is in favour of the rule that a belligerent may perform all acts during armistice as not expressly prohibited under the terms of the armistice.

Effects of treaty of peace.—On the conclusion of a peace treaty there is an end of the State of war and restoration of peace. The former belligerents cease to be enemies and friendly intercourse gets established between them. After the peace treaty is concluded warlike acts, if commited even in ignorance of the cessation of conflict become illegal; and according to Hall such act must either be undone or compensation must be given for damages caused by them.

Oppenheim describes the effects of a peace treaty thus :—

"On the one hand, all acts legitimate in warfare cease to be legitimate. Neither capture of ships, nor occupation of territory, nor contribution nor requisitions, nor attacks on members of armed forces or on fortresses, are any longer lawful. If forces, ignorant of the conclusion of peace, commit such hostile acts, the condition of things at the time peace was concluded must as far as possible be restored, and compensation must be paid. Thus, ships captured must be released, territory occupied must be evacuated, members of armed forces taken prisoners must be liberated, contributions imposed and paid must be repaid. On the other hand, all peaceful intercourse between the former belligerents, and, between their subjects, is resumed as before the war. Thus diplomatic intercourse is restored and consular officers recommence their duties "[1]

The termination of war gives rise to an obligation on the belligerents to withdraw their forces from the territory of their opponents, to liberate prisoners of war and to release persons taken in custody as alien enemies.

The acts of hostility done in ignorance of peace though not criminal are illegal and the guilty party is liable to make reparations for the wrong done. Compensation for such acts may even be recovered from the officer through whose operations the damage was caused. The home State of the officer generally holds such officers harmless.

Uti possidetis.—The principle of *uti possidetis* permits belligerents to retain what they acquired during war. A peace treaty has no retrospective operation and the former belligerents are entitled to what exists at the time of the conclusion of the peace. Unless otherwise stipulated for in the peace treaty, whatever belligerents acquired during war remains their property. "Unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the conclusion of peace. Thus, all movable State property such as munitions, provisions, arms, money, horses, means of transport and the like, seized by an invading belligerent remains his property as likewise do the fruits of immovable property seized by him. Thus further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor who may annex it."[1]

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1. Oppenheim—International Law Vol. II. p. 611.

On the termination of war and conclusion of peace the doctrine of *uti possidetis* comes into the play to validate possession acquired during war. This doctrine is applied to maintain the state of possession existing at the time of the conclusion of the treaty of peace. Unless there is a stipulation to the contrary in the treaty of peace, the state of things found at the time of peace continues.

Amnesty.—A peace treaty confers immunity on belligerents, members of their armed forces and their subjects for wrongful acts committed during war. It is usual to insist an amnesty clause in peace treaties. Amnesty is however subject to the terms of the peace treaty. Unless there is anything to the contrary in the peace treaty, war crimes cannot be punished after the conclusion of the peace treaty and there is general condonation of all illegal acts done during war.

But wrongful acts committed by subjects of a belligerent against their own sovereign or government are not covered by amnesty. A belligerent therefore can punish its own subjects for crimes such as treason, desertion and the like committed during war.

Release of prisoners of War.—With the termination of war the prisoners of war held by belligerents should be liberrated without delay. The Geneva Convention of 1949 provides that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. The Geneva Convention contains detailed provisions with regard to the release of prisoners of war after the cessation of active hostilities. It requires the detaining power to execute a plan for the immediate release and repatriation of prisoners of war. It further lays down that prisoners eligible for repatriation shall not be kept back on the ground that they have not yet served sentences imposed on them in respect of disciplinary offences. The prisoners undergoing sentences for indictable offences are required to be released on completion of their punishment.

CHAPTER LI

POSTLIMINIUM

The Concept of Jus Postliminii.—"The *jus postliminii* of the Romans implied certain principles of their private law, as well

as conceptions derived from the fetial institution appertaining to the declaration of war and conclusion of peace. It referred to the right by which persons or things captured in war regained their former condition on their return to the country to which they belonged ; so that, by judicial fiction a Roman prisoner of war, for example, might avoid the ordinary consequences of captivity. The doctrine applied to Roman citizens, slaves, immovables, and certain movables, *e g.*, trained horses, pack-mules, transport vessels ; everything else captured by the enemy became his permanent booty—notably arms, which it was thought could not be lost without dishonour. The doctrine did not apply to deserters, to those who yielded to the enemy through cowardice or were formally surrendered to the enemy, or preferred to reside, with the enemy, and to certain others."[1]

The concept of *jus postliminii* is of Roman origin and has been imported into International Law by jurists. The *jus postliminii* of the Romans was a rule by which persons and things captured by enemy regained their former condition on their return to the Roman territory to which they belonged. This rule enabled Romans who had been enslaved in foreign country to regain their citizenship on their return to their country. Roman property captured by enemy reverted to the Roman owner on its being received back into Roman territory. The Romans applied the rule of *jus postliminii* to Roman citizens, slaves, immovables and certain movables. This rule "operated to restore to their former status both persons who, after being held in captivity by a foreign State, crossed the boundary (*limen*) and came within Roman territory as well as property held by the enemy and brought back within the boundaries of the empire."[2]

This Roman doctrine has been adopted in International Law and is employed to mean that persons, property and territory captured by an enemy are presumed to revert to their former condition on the withdrawal of enemy control. "The doctrine of *postliminium* signifies broadly that the mere possession in the course of war of property or territory of the enemy does not suffice generally to transfer title or sovereignty as the case may be as against the enemy owner or sovereign which regains possession during the conflict. It doubtlessly emphasizes the fact that the rights of that owner or sovereign as such are suspended rather than destroyed by temporary loss of possession "[3]

1. Colemn Phillipson—Termination of War and Treaties of peace, pp. 230—231.
2. Fenwick.—International Law p. 664.
3. Hyde.—International Law Vol. III p. 2419.

The doctrine of *jus postliminii* in International Law has the effect of restoring persons, property and territory captured by enemy to their former condition on withdrawal of enemy control. The effect of *jus postliminii* may be stated thus :—

Effect on movable property.—The *jus postliminii* would require that movable property taken on land would revert to its former owner if it is identified and speedily recovered. But as already noticed public movable property can only be seized if it is required for use in military operation. Should such property be found unused, after the withdrawal of the enemy, it reverts to the State to which it belonged. Private movable property cannot be seized unless it is required as a war material. It is a rule of International Law that private owners of movable property, seized during war, are entitled to be compensated in respect of such seizure. If the property has been appropriated, compensation would be payable, but if the property seized has not been appropriated and is identified it reverts to its owner. It may however be noted that property taken at sea is not governed by *jus postliminii* but by municipal law of salvage.

Effect on Immovable Property.—The doctrine of *jus postlimini* ; applies to immovable property belonging either to the State or to private persons. Immovable property belonging to private persons cannot as a rule be appropriated by the belligerent occupant. It can only be used by him. If the occupant illegally appropriates such property the private owner can claim it back on the withdrawal of the enemy. The occupant can only enjoy the usufruct of the public immovable property and therefore no question of reversion arises after he has left the territory. If however the occupant has sold public immovable property, the legitimate Government, after the withdrawal of the enemy can recover such property from the purchaser without compensation. If the immovable property belonging to a private person has been appropriated and sold by the occupant illegally, it can be recovered by the private owner from the purchaser without payment of any compensation.

Effect on Territory and Sovereignty.—On the termination of the occupation, the authority of the legitimate sovereign is restored and the territory comes back under the control of the legitimate Government. When legitimate sovereignty is restored, the operation of territorial laws and jurisdiction of courts revive. The territory and the individuals living thereon come back under the sway of the legitimate sovereign. The

withdrawal of enemy control from the territory works out a revival of the former condition of things.

Effect on Acts done during Occupation.—All legitimate acts done during occupation remain valid and cannot be undone after the enemy has withdrawn. The State to which the territory has reverted is bound to recognise all legitimate acts done by the occupant. "Therefore, if the occupant has collected ordinary taxes, has sold the ordinary fruits of immovable property, has disposed of such movable property as he was competent to appropriate or has performed other acts in conformity with laws of war, this may not be ignored by the legitimate sovereign after he has again taken possession of the territory."[1] Acts done within rights hold good so far as they have taken effect and acts done in ordinary exercise of civil and criminal jurisdiction are binding on legitimate Government.

But acts done by the occupant in excess of his rights are wholly annulled on the withdrawal of the enemy control over the territory. The legitimate sovereign on getting back the territory is entitled to annul illegitimate acts done by the occupant.

Applicability of the doctrine.—The doctrine applies only where the acts of the occupant are in excess of his rights. It would appear that legitimate action taken by the occupant are not subject to the doctrine of *jus pastliminii*. An occupant is permitted by International Law to demand contribution from the inhabitants of the occupied territory either for the needs of the army or for the administration of the territory. The doctrine of *jus postliminii* will not apply to contributions. Similarly, it will not apply to requisitions or to taxes received by occupant. The doctrine has no application when a territory ceded to the enemy by a peace treaty or conquered and annexed by the enemy reverts to its former owner. It does not also apply to a case where the territory which had been conquered and subjugated succeeds in regaining its freedom and becomes a part of the former State.

The case of the Elector of Hesse-Cassel.—It is the leading case on the doctrine of *jus postliminii* and deserves notice. *Hesse-Cassel* a neutral territory was during the Franco—Prussian War invaded and occupied by the French troops in 1806. The Elector of that State who was driven out had valuable mortgagee rights in considerable landed property in *Hesse-Cassel.*

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1. Oppenheim—International Law Vol. II p. 618.

The French military occupation lasted till the end of 1807 when under a treaty a good portion of the domains of *Hesse-Cassel* was added to the territory of the newly formed State of Westphalia while a small portion was retained by the French. The King of Westphalia and Napoleon entered into an arrangement with regard to *Hesse-Cassel* on April 22, 1808. It was agreed between the parties that the King of Westphalia would have a right to collect debts due to the Elector from those debtors who were either his subjects or had domiciled in Westphalia while Napoleon of France would be entitled to debts from debtors who were not subject of the King of Westphalia or domiciled in Westphalia. By virtue of this agreement Napoleon received part payment of a debt due to the Elector from one Count Von Hahn who had mortgaged his landed property to the Elector and issued a receipt of full discharge. This receipt was signed by Duke of Macklenburg under the authority of Napoleon and was duly registered.

In 1813 after Napoleon had lost power under a treaty of December 2, 1813 the Elector was restored to his domains. The treaty was further confirmed by the Treaty of Paris of 1814. The former Elector having died by this time, his son made a claim to realize his debts on the basis of the doctrine of *jus•postliminii*. He asserted that Napoleon was not within his rights to receive payment of his debts and to give a complete discharge to the debtors.

This claim of the Elector did not succeed and the plea of the applicability of the doctrine of the *jus postliminii* was repelled. It was held that conqueror's title was full and complete and the receipt of payment as well as the full discharge given by Napoleon were valid and legal and that although the domains returned to its former owners the acts done by the conqueror within his rights could not be undone.

CHAPTER LII

WAR CRIMES

War Crimes.—"Violations of the rules of warfare are called war crimes. General International Law obligates the States to punish their own war criminals and authorises any belligerent State to punish the prisoners of war in its power for having violated the rules of warfare prior to capture.

Hence general International Law imposes upon individuals as private persons, the obligation to refrain from committing war crimes and establishes individual criminal responsibility for the commission of such crimes by private persons."[1] According to *Oppenheim* war crimes are such hostile or other acts of soldier or other individuals as may be punished by the enemy on capture of the offender. *Oppenheim* definition is wide enough to include all hostile acts which the enemy captor can punish. The modern trend of international thought is in favour of treating violations of the rules of warfare as well as initiation of an aggressive war and breach of peace as war crimes. It would appear from a close study of the trials which were held after the conclusion of the Second World War that violations of the recognised rules of International Law in initiating and in conducting warfare constitute war crimes.

Kinds of War Crimes.—According to *Oppenheim* there are four kinds of war crimes: (1) Violations of the recognised rules regarding warfare committed by members of the armed forces, (2) all hostilities in arms committed by individuals who are not members of the enemy armed forces, (3) espionage and war treason, (4) all marauding acts.[2] Within the first class Oppenheim groups, such acts as making use of poisoned or otherwise forbidden arms and ammunitions, killing or wounding the sick or the wounded, treacherous request of quarter, illtreatment of the prisoners of war or the wounded and sick, killing or attacking harmless private individuals, disgraceful treatment of dead bodies, unlawful bombardment of historical monuments and of hospitals, and buildings devoted to Art, Science and Charity, violations of Geneva Convention, unlawful attacking or sinking enemy vessels, violations of the truce and of cartels, capitulations and armistices. The second kind of war crimes consists in acts of hostilities committed by private individuals who do not enjoy the privileges due to members of armed forces. International Law recognises the rule that individuals who though not belonging to the armed forces take up arms are guilty of war crimes.

The acts of espionage committed by soldiers or private individuals of one belligerent are punishable as war crimes by the other belligerent. Such acts are war crimes when they are committed within the lines of a belligerent. War treason,

1. Hans Kelsen—Principles of International Law, p. 128.
2. Oppenheim—International Law, Vol. II 567.

according to *Oppenheim*, consists of "all such acts (except hostilities in arms on the part of the civilian population, spreading of seditious propaganda by aircraft and espionage) committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy."[1] The fourth kind of war crime consists in all acts of plunder committed in violation of the rules of International Law by civilians or soldiers.

To the above war crimes may be added two new kinds of crimes, namely the crimes against the peace and against humanity which were along with war crimes proper were tried by the Nuremberg Military Tribunal after the close of the Second World War. The crime against the peace was an innovation and it consisted in violating the Pact of Paris providing for renunciation of war as an instrument of national policy. Crimes against Peace were expressed to be such acts as planning, preparation, initiating or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participating in a common plan or conspiracy for the accomplishment of any of the above acts. Crimes against humanity for which individuals were tried by the Military Tribunal at Nuremberg were murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated. It may however be noted that crimes against humanity committed before war are certainly new classes of War crimes and those committed during War include some crimes which may legitimately fall under one or more of the four kinds specified above.

Trial of War Criminals.—Although International Law concedes a right to belligerents to punish war criminals their heads, the trial of individuals for war crimes came into falling vogue after the First World War. "Prior to the First World War it was the custom for belligerents to insert in their treaties of peace an amnesty clause creating an immunity in relation to each belligerent for all persons who had committed wrongful acts on behalf of or in the service of the other belligerent during the course of the war. Even in the absence of treaty stipulation, an amnesty was one of the legal effect of the termination of war."[2] The present attitude of the nation is to deal

1. Oppenheim—International Law Vol. II (Seventh Edition) p. 575.
2. Fenwick—International Law (Third Ed.) p. 668.

with the question of the trial of war criminals in the peace treaties concluded after the war.

The rule of customary law which allowed amnesty in respect of war crimes was not followed at the close of the First World War and the Treaty of Versailles provided for the trial and punishment of the German Kaiser and other German officials. The Treaty further provided for the constitution of a special tribunal which was directed to act according to 'the highest motives of international policy.' The Kaiser was to be tried 'for a supreme offence against international morality and the sanctity of treaties.' It was recognised by the German Government that the Allied and Associated Powers had the right of bringing before military tribunals persons accused of having committed acts in violation of the laws and customs of war. The provision for the trial and punishment of war criminals by the victorious powers in the Peace Treaty had however no effect for the Allied and Associated Powers failed to secure the surrender of the Kaiser or other German officials and could not bring the war criminals to trial by the special tribunal constituted under the Treaty. The whole scheme of trial of war criminals specified in the Treaty of Versailles failed and a few of the accused were tried before the German Imperial Supreme Court at Leipzig in 1921. It will thus be noted that the Treaty of Versailles with its provisions for the trial of war criminals showed that an amnesty did not as a matter of course follow the termination of a war.

The Second World War saw the commission of innumerable war crimes. The laws and customs of war were ruthlessly violated and the belligerents in their gigantic efforts to win the war adopted methods which defied even the recognised rules of International Law. At the Tripartite Conference at Moscow in 1943 it was declared that the members of the German armed forces and of the Nazi party guilty of war crimes should 'be brought back to the scene of their crimes and judged on the spot by the peoples they have outraged' and that the major 'war criminals whose offences had no geographical location' would be punished 'by a joint decision of the Government of the Allies.' This declaration led to the conclusion of an Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis on August 8, 1945 by the United States, the United Kingdom, France and Soviet Russia. The Charter annexed to the Agreement provided for the constitution of the Military Tribunal and defined its functions and jurisdiction. It defined offences for which the accused may be held individually responsible. An unique feature of the Charter was

that it provided for the trial of groups and organisations and conferred on the Tribunal the jurisdiction to declare them criminal. The Tribunal declared only three groups criminal.

The other notable trial which was held after the Second World War was the Tokyo trial of Japanese Major War Criminals by the International Military Tribunal of the Far East. This Tribunal was established by the Supreme Commander for the Allied Powers in the Pacific by a proclamation of January 19, 1946. To this Proclamation was attached a Charter which was similar to that of the Nuremberg Tribunal. These two trials will stand out in history for the important principles of law that they laid down with respect to the trial of war criminals. The various Allied States set up military courts for the trial of war criminals who were surrendered by international arrangements.

Nuremberg Trial

Jurisdiction of the Tribunal.—An International Military Tribunal was established at Nuremberg to try the major war criminal of the European Axis countries. The Tribunal derived its jurisdiction from the Agreement of 1945 and Charter which was attached to the Agreement. It had jurisdiction to try and punish individuals who had committed crimes against Peace, conventional war crimes and crimes against Humanity. The Charter authorised the Tribunal to declare any group or organisation a criminal organisation. Article 6 of the Charter invested the Tribunal with "the power to try and punish persons, who acting in the interests of European Axis countries, whether as individuals or as members of organisations." The following acts were expresssed to constitute crimes falling within the jurisdiction of the Tribunal :

(*a*) **Crimes against Peace.**—namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(*b*) **War Crimes.**—namely violations of the laws or customs of war including murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the sea, killing of hostages, plunder of public or private property, wanton destruction of cities, town or villages or devastation not justified by military necessity.

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(c) '**Crimes against Humanity.**—namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or prosecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where prepeiated.'

With regard to crimes against Humanity the Tribunal was asked to take into cognizance crimes which Germany committed before the outbreak of war in 1939. It was estab lished that Germany did not only follow a policy of persecution, repression and murder of civilians in Germany before the war but also mercilessly persecuted the Jews. The Tribunal was of the opinion that 'to constitute crimes against humanity the acts relied on before outbreak of war must have been in execution of, or in connection with any crime within the jurisdiction of the Tribunal.' The Tribunal held that it was not satisfactorily proved that the acts committed before war were done in execution of or in connection with any crime within its jurisdiction and therefore it did not make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter.

Twentytwo German and Nazi leaders together with six organisations were charged with war crimes stated above before the Tribunal.

The law administered by the Tribunal.—The Charter attached to the Agreement of 1945 laid down the law that was to be followed by the Tribunal. When the Charter declared that a certain act was a war crime, the Tribunal was bound te treat that act as a war crime. The Tribunal expressly recognised in its judgment that the law of the Charter was decisive and binding upon it. The Tribunal held :—

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered ; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal.........it is the expression of International Law existing at the time of its creation ; and to that extent is itself a contribution to International Law."

The signatory Powers which created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done

together what any of them might have done singly; for it is not doubted that any nation has the right thus to set up special courts to administer law with regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on facts and the law."

Defence.—The defendants took various pleas. The important points taken in defence were:—

(*a*) that the charges in the Indictment that the defendants planned and waged aggressive wars were unproved;

(*b*) that there can be no punishment of crime without a pre-existing law. *Nallum crimen sine lege, nulla poena sine lege. Expost facto* punishment is abhorrent to the law of all civilized nations. The defendants contended that inasmuch as no sovereign power had declared aggressive war a crime at the time the alleged criminal acts were committed, no statute had defined aggressive war and no penalty had been fixed for the commission of an aggressive war, they could not be punished for initiating the war;

(*c*) that the charge with regard to the murder and ill-treatment of Soviet prisoners of war was improper, for the Soviet Rebublic was not a party to Geneva Convention on the provisions of which the charge is based;

(*d*) that the defendants could not be legally charged with the offence of common planning or conspiracy for waging a war of aggression or of a war in violation of international treaties where it was the dictator who planned such war;

(*e*) that the defendants could not be held individually responsible for the war was under the International Law an act of the State and those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State;

(*f*) that the defendants simply carried out the orders of their Government and were under the law protected.

Judgment of the Tribunal.—The trial of the major war criminals before the Nuremberg Tribunal began on November 20, 1945. The hearing of the evidence and the arguments of the counsel appearing for the prosecution and the defence concluded on August 31, 1946. The Tribunal pronounced its

judgment on September 30, 1946. Of the accused Nazi leaders three were acquitted twelve including one who was tried in absentia were sentenced to life imprisonment and the remaining four were sentenced to long term imprisonments.

On the important pleas raised in defence and stated above the Tribunal held ;

(*a*) "To initiate a war of aggression, therefore, is not only international crime : it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland......was most plainly an aggressive war which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes both against the laws and customs of war, and against humanity.

In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive and in the opinion of the Tribunal they were acts of aggressive war.

The invasion of Belgium, Holland and Nuremberg was entirely without justification. It was carried out in pursuance of policies long considered and prepared and was plainly an act of aggressive war.

On June 22, 1941 without any declaration of war, Germany invaded Soviet territory in accordance with plans so long made ...."

(*b*) "In the first place, it is to be observed that the *maxim nulla crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurance have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him it would be unjust if his wrong were to go unpunished. Occupying the positions they did in the Government of Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all International Law when in complete deliberation they carried out their designs of invasion and aggression. On this view

of the case alone it would appear that the maxim has no application to the present facts.

In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in International Law; and those who plan and wage such a war........are committing a crime in so doing."

(*c*) "The agreement in defence of the charge with regard to the murder and ill treatment of Soviet prisoners of war, that the Union of Soviet Socialists Republic was not a party to the Geneva Convention, is quite without foundation."

(*d*) "In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants..............

The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it..........When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated..............."

(*e*) "It was submitted that International Law is concerned with the action of sovereign States and provides no punishment for individuals; and further, that where the action in question is an act of State those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal both these submissions must be rejected...........Individuals can be punished for violations of International Law. Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crime can the provisions of International Law be enforced............

...............The authors of those acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

He who violates the laws cannot obtain immunity while acting in pursuance of the authority of the State if the State

in authorising action moves outside its competence in International Law."

(*f*) "It was also submitted on behalf of the most of these defendants that in doing what they did they were acting under orders of Hitler, and therefore cannot be held responsible for acts committed by them in carrying out these orders. The Charter specifically provides in Article 8 :

'The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.'

The provision of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the International Law of war has never been recognised as a defence to such acts of brutality, though, as the Charter provides, the order may be urged in mitigation of this punishment. The true test, which is fonnd in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

Superior orders even to a soldier cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification."

Justification for the Nuremberg Trial—The trial by the International Military Tribunal at Nuremberg was unique in more ways than one and a war-tired world watched it with great interest. The Tribunal had a difficult task to perform and while the trial of Nazi leaders was proceeding, it appeared that the Tribunal was itself on trial. Jurists all over the world applied their minds to the legality of this trial and many of them criticized the Agreement, the Charter and the law which Tribunal was required to administer. It may however be noticed that a number of jurists while making comments on the trial put forward learned arguments in support of the action taken by the Allied Powers in bringing the Nazi leaders to trial in the manner specified in the Agreement and the Charter. Several objections are raised with regard to this trial and it is necessary to deal with them birefly.

The objection that the Tribunal was not represented by all the States which had signed or had adhered to the Agreement and that on that reason it was not an International Military Tribunal is ill founded. The nineteen States, which before the trial, came to adhere to the agreement not having

claimed to be represented on the Tribunal must be deemed to have tacitly accepted the members of the Tribunal as their representatives also. A belligerent in the exercise of its right to bring to Trial the War Criminals is entitled to constitute the representative of its ally to take part in the trial.

In some quarters it was seriously contended that the charge with respect to the initiation or waging of an aggressive war was wholly improper. Those who raised this objection maintained that the Pact of Paris had not the effect of making initiation or waging of a war an international crime, did not, besides declaring war to be illegal, prescribe any sanctions and was not respected by States even before the Second World War. It was also contended that individuals participating in a war in contravention of the provisions of the Pact could not be held personally liable and that at any rate the law relied upon was retrospective and was wholly uncertain and perhaps unknown to the accused. The above objections are altogether unsound inasmuch as they lose sight of the fact that the Pact of Paris which declared war illegal was a solemn treaty by which the States signing it were bound and that the initiation or waging of a war was a deliberate breach of the treaty. The objection that the acts in question were not criminal when committed cannot be raised, as there is no rule of Internatinnal Law which prohibits the trial for acts which were not criminal at the time of commission. Further the Pact constituted a treaty, which rendered illegal such a war as was planned and fought by these war criminals and it can hardly be said that they did not foresee the consequences of their guilt. It can be hardly urged that law did not prescribe punishment for such acts, for punishment follows naturally an illegal act. Punishment on the count of violations of laws and custom of war cannot be objected to on the ground of the principle of retroactivity, because even under the traditional rules of International Law the victors were entitled to try the culprits for violations of laws of war. The crimes against humanity as defined in the Charter to the Agreement of August 8, 1945 although not in strict sense war crimes under the traditional rule of Internatinnal Law were always regarded to be heinous and were condemned as being immoral. The Charter had not the effect of creating new heads of crimes but gave condemnable acts legal recognition. The accused could not therefore claim immunity from punishment for these heinous and universally reaognised immoral acts. The Tribunal itself met with this argument and observed :

"In the opinion of Tribunal the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in International Law; and that those who plan and wage such a war with its inevitable and terrible consequences are committing a crime in so doing............it is argued that the Pact does not expressly enact that such wars are crimes or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention ....(which) prohibited resort to certain methods of waging war.........Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal nor is any sentence prescribed nor any mention made of a court to try and punish offenders. .... In interpreting the words of the Pact it must be remembered that International Law is not the product of an international legislature and that such international agreements as the Pact of Paris have to deal with general principles of law and not with administrative matters of procedures ....The law is not Static but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing." The contention that the Pact of Paris was broken before 1939 by other States is futile for the reason that the law is not rendered unenforcible by the violation committed in respect of that law. The law which the Tribunal applied and which the Charter prescribed was not new and really existed before the Agreement was signed. The Pact of Paris had already declared war illegal and the States which signed it were fully aware of its significance Moreover ignorance of law had never been defence in a court of law. Besides, there was nothing to justify the breach of a solemn international treaty. The war which Germany initiated was in violation of the terms of the treaty and was clearly punishable. Those who bring about a war are also guilty of violating the treaty and are punishable. International Law is progressive and it cannot be urged successfully now that a State has a right to wage a war. All those who plan and initiate war in a world which abhors war commits a crime against peace.

Another objection which is often raised is that Article 8 of the Charter to the Agreement of 1945 provided that the fact that the accused acted in pursuance of the orders of the

Government or of superior officers would not absolve them from responsibility but would be considered in mitigation and that the accused were punished for wrongs for which they could not be punished when they were committed, on their plea of the orders of the Government or of the superior officers. This objection is really one on the ground of retroactivity and may *prima facie* be regarded to be correct. But so far as the German accused were concerned they could not urge this objection for the simple reason that their own Municipal Courts before the war did not absolve the accused under Municipal law of responsibility on the ground that they acted under the orders of the Government or of their superior officers. The Nazi war criminals were expected to know their own municipal laws and they could not hope for a better treatment under the International law. *Julius Stone* observes : "Yet even here it is doubtful whether the substantial policy of the principle against retroactivity of punishment was seriously violated. For, in the first place, Germans nationals cannot have been too confident in view of contrary rulings of German Courts and of other Allied States, that the plea was available to them ; and in the second place, the authority both of the International Tribunal and of British Military Courts consider the plea in mitigation was wide enough to avoid substantial injustice. If any merit remains to the objection it is only as to war crimes *stricto sensu.* In so far as there might be uncertainty or conflict of view of the rules of war-law involved and an inferior cannot be expected to know better than his superior, there might well be substantial injustice. The Tribunal's powers to accept the plea in mitigation, however, removed even this danger." [1]

Tokyo Trial.—This trial proceeded on the same principales which guided the Nuremberg Trial. The Charter of the International Military Tribunal for the Far East classified the crimes into three groups, namely, crimes against peace, conventional war crimes and crimes against humanity together with separate crimes of conspiracy. The Tribunal consisted of eleven judges representing States at war with Japan and British Commonwealth of Nations, India and Philippine Islands. There were twentyeight accused against whom different charges were put forward by the eleven States. The various charges were in respect of conspiracy for the domination of East Asia, Manchuria and China waging an illegal war, conspiracy with Germany and Italy, murder of the people of the prosecuting States, armed attacks in violation of general International Law and of treaties, inhumane treatment of prisoners of war and

1. Juilus Stone :—Legal Controls of International Conflict p. 363.

other conventional war crimes. The trial commenced on June 4, 1946 and the judgment was pronounced on November 4, 1948. Some of the accused were sentenced to death while others to various terms of imprisonment.

One of the Judges, *Dr. Radka Benode Pal* of India gave a dissentient judgment. He held that the Pact of Paris had not the effect of laying a positive rule of International Law and of making war an international crime. He held that conspiracy was not a crime under International Law and the charge of conspiracy was not at all proved on the evidence on the record. In the result he gave his verdict that the accused were not guilty of the offences with which they were charged.

Comments on the Tokyo trial.—In substance there does not appear to be much difference in the nature of offences for which the accused were tried at Neuramburg and at Tokyo. The Charter to the Agreement of 1945 defining the powers of the Military Tribunal set up at Neuranburg was similar to that attached to the Proclamation issued on January 19, 1946 by the Supreme Commander for the Allied Powers in the Pacific which set up the Tribunal at Tokyo. The Tribunal set up at Tokyo was not a court of the United States of America or other Allied Powers which then occupied Japan. It was on this ground that the United States Supreme Court refused to review or set aside the judgment of the Tokyo Military Tribunal for the Far East.[1]

The traditional International law permits the victor to punish such war criminals as may fall into his hands. The victor has also the right to impose an obligation on the defeated in the Peace Treaty to surrender all the war criminals to it for trial and punishment, if necessary. The victorious State is in a position to dictate its terms and the defeated State has no option but to discharge all obligations imposed on it by the Victorious State. It is thus obvious that it is the will of the victor that prevails and the defeated State can hardly insist upon the trial for war crimes of the individuals who belonged to the victorious belligerents. The Military Tribunal at Tokyo was thus engaged in trying individuals under the law laid down by the Allied Powers—a law not enacted in any constitutional manner but one forced upon the defeated State and the various accused persons. The Peace Treaties, as is well known, though represent an agreement between the victorious and defeated States, contain terms dictated by the Victorious State and represent agree-

1. Kakti Hirota et Al v. Douglas Mc Arthur 338 U. S. 197.

ments which may be held to be void under the Municipal laws relating to contracts in most of the civilized countries. But since International Law has not yet reached that State of perfection which Municipal laws have attained, the Tokyo trial is to be judged by standards set up under the rules of International Law. The objection which is sometimes raised, that the trial of the accused on a law laid down by the prosecutor was not consistent with justice appears to be unsound. International Law being based upon the rules of natural law can hardly favour acts which are not only heinous and brutral but universally condemnable and in its dealings with the defeated State in the interests of international peace and security the victor is justified in demanding the trial and punishment of those individuals who committed acts which cannot be condoned. Some of the offences enumerated in the Charter were punishable under the rules of International Law as it stood in 1939 when the war broke out. There were others which were not so punishable, but there can be justification for objecting to the trial on that ground. It can be hardly denied that some of the acts for which the accused in this trial were punished were in violation of the recognised principles of morality, and the victors were justified in introducing the principles of morality in International Law to punish the perpetrator of such wrongs.

The objection that has been vehemently pressed is that although International Law as it stood in 1939 embraced a principle of humanity and also permitted intervention on humanitarian grounds it did not punish individuals for crimes against humanity and the trial of the accused for such an invented crime was unjust. Those who press this objection do so on ideas based upon Municipal Laws and ignore the contents and the purpose of International Law. It is now universally recognised that it is the individual behind the State whose conduct is ultimately regulated by International Law and the individual is the immediate subject of that law. *Lauterpacht* justly says : "In particular when we say that International Law regulates the conduct of States we must not forget that the conduct actually regulated is the conduct of human beings acting as the organ of the State." When International Law aims at the well-being of the States it really has in view the good of the individual human beings who compose the state. As the sanctity of the individual had been fully recognised the crimes against humanity could hardly be lost sight of and condoned. The well settled principles of punitive law demanded the trial of individuals who were guilty of crimes against humanity for award of punishment has always a deterrent effect.

CHAPTER LIII

NUCLEAR WARFARE

General.—Nuclear weapons of warfare which modern scientific research has made available have raised difficult problems for international lawyers. These instruments of destruction, besides raising a number of interesting questions of International Law, have created a reasonable anxiety about the future of the world and of mankind. The scientific experiments have brought the conviction that nuclear warfare would result in worldwide destruction of life. The availability of nuclear weapons as instruments of warfare has to be accepted and it is for International Law to provide rules to control effectively or prohibit the production and use of such weapons. The traditional rules of International Law, if insufficient to control or prohibit the production and use of nuclear weapons are to be supplemented with new rules that may be adequate to meet the situation arising from the discovery of atomic and hydrogen bombs. It will be within the scope of International Law to prevent a nuclear warfare.

It is not possible to imagine the consequences of a nuclear warfare or of uncontrolled production of, or even experiments with, nuclear weapons. A nuclear warfare, it is considered by scientists, may result in annihilation of the whole race of mankind. The production of nuclear weapons is as dangerous as its use. A technical fault in experiments of these instruments of destruction may bring a disaster to a considerable part of the world. A nuclear warfare cannot maintain a distinction between front and rear and between combatants and non-combatants. The consequences of such a warfare cannot be easily imagined and it may be safely said that it will bring disaster not only to the present race of mankind but also to future generations, for the radioactive contamination spread by it will long continue to kill and disable large number of future lives. The production of nuclear weapons has created a serious situation both in political and legal spheres. The present political situation rules out the possibility of the establishment of an international organization strong enough to control both the production and use of nuclear weapons. The international lawyers can, of course, mobilize public opinion by laying down legal principles prohibiting the production and use of such weapons.

The events of the last phases of the Second World War which shocked the world at the destruction of human life in Hiroshima and Nagasaki by the atomic bombs dropped

by the Allied Powers. The use of atomic weapons in Japan is being justified on a number of grounds. The argument which is often urged in justification is that Japan as enemy had flouted principles of humanity and deserved an atomic bomb disaster. *Lauterpacht* observes that the use of nuclear weapon may "be justified against an enemy who violates rules of the law of war on a scale so vast as to put himself altogether outside the orbit of considerations of humanity and compassion." It is also urged that the victorious nations were within their rights to drop the atomic bombs to prevent the loss of human lives at the hands of the Japanese forces.

Whatever may be said in justification of the use of atomic bombs by the Allied Powers, the fact remains that a nuclear warfare has become a possibility. The production of atomic energy has since then become a national activity and a competitive spirit has come to pervade nations with regard to its production. Mankind has been put in a tremendous fear and the whole world stands on a precipice. The legal issue relating to nuclear warfare is observed by the changing bouts in the international political arena. But something has to be done to save the world from annihilation.

Legality of the nuclear weapons under the existing Law.—The existing rules of International law do not speak of atomic weapons but there is no doubt that they are wide enough to cover them. An atomic bomb explodes through fission of *uranium* and *plutonium nuclei.* A hydrogen bomb may be described as 'a projected bomb in which the explosion, though due to nuclear changes, operates not through fission but by fusion of *nuclei* of hydrogen isotopes called *tritium.* The hydrogen bomb is more destructive than the uranium bomb. The Hague Regulations prohibit poisons and poisoned arms. When atomic bomb explodes radioactivity is given off in all directions in the form of radiation which is destructive. The explosion of the atomic bombs must produce heat and radiation effects coupled with contamination of the atmosphere. Although the introduction of this heat and radiation into the body will lead to death, it is not possible to say that atomic bombs either produce poison gas or are poisoned arms. The dictionary meaning of the word 'poison' militates against the view that atomic weapons are within the ambit of the Hague Regulations." In contemporary usage, the term covers—not only in English—any substance that, when introduced into or absorbed by a living organism, destroys life or injures health. This excludes death or injury to health by means of force, whether the cut of a sword, the thrust of a spear, the piercing

of the body by an arrow or bullet or injury inflicted by explosion or blast. Thus, it is little in doubt that the blast effects of nuclear weapons are not covered by the prohibition of the use of poison."[1]

Geneva Protocol of 1925.—

The Geneva Protocol of 1925 lays down the rule that the use in war of 'asphyxiating poisonous or other gases and of all analogous liquids, material or devices is prohibited. This rule, it appears, is wide enough to cover nuclear weapons for the expression 'analogous liquids, materials or device' is comprehensive to include any weapon. The mere fact that nuclear weapons were not in existence at the time of the conclusion of the Protocol will not afford justification for holding that nuclear weapons fall outside the scope of the Protocol. *Schwarzenberger* observes : "Even if this were not so, the words 'all analogous liquids, materials or devices' are so comprehensively phrased as to include any weapons of an analogous character, irrespective of whether they were known or in use at the time of the signature of the Protocol. If the radiation and fall-out effects of nuclear weapons can be likened to poison all the more can they be likened to poison gas which is but an even more closely analogous species of the genus 'poison'." It will thus appear that the Geneva Protocol does provide rules prohibiting the use of nuclear weapons. The Protocol lays down customary International Law and is binding on the States.

The Declaration of *St. Petersburg* of 1868 lays down that the 'employment of arms which needlessly aggravate the sufferings of disabled men or renders their death inevitable' is 'contrary to humanity.' The blood—curdling stories of the sufferings of the unfortunate victims of the first atomic bombs that were dropped on Hiroshima and Nagasaki prove that nuclear weapons are easily the worst type of arms, the employment of which needlessly aggravate the sufferings of disabled men and renders their death inevitable. The use of nuclear weapons resulting in long bodily suffering must also constitute a crime against humanity. The principles laid down in the Charters to the Nuremberg and Tokyo International Military Tribunals embrace all inhumane acts. Nuclear weapons with enormous destructive potentialities are undoubtedly instruments leading to the commission of inhumane acts and their use must necessarily offend against those principles.

Genocide Convention of 1948.—

The Genocide Convention of 1948 declares genocide a

1. Georg Schwarzenberger : The Legality of Nuclear Weapons p -7.

crime whether committed in war or in peace. Acts aimed at destroying "a national, ethnical, racial or religious group as such, killing members of a group, causing them serious bodily or mental harm, deliberately inflicting conditions on the group to bring about its physical destruction, imposing measures to prevent births within the group and forcibly transferring children from it to another group, constitute genocide under the Convention. The employment of nuclear weapons would necessarily come within the mischief of the Convention, for it would result in the elimination of groups and destruction of life. But the question whether the Convention would be binding on all the States cannot be easily answered. The Convention is in force between fifty-two States subject to reservations on the part of a number of States. The Soviet Russia is a party to it subject to reservation. The United Kingdom and the United States of America are not parties to it. In these circumstances, the principles of the Convention have only a persuasive effect on nations not parties to it. The Convention cannot therefore be regarded as laying down General Law prohibiting the use and employment of nuclear weapons.

Geneva Convention IV of 1949.

The Geneva Convention IV of 1949 embodies rules for the amelioration of the condition of the wounded and sick in the Armed Forces in the field, for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea and in respect of the treatment of prisoners of war and for protection of civil persons, in time of war. This Convention is not at all expressly applicable to nuclear weapons. It is not possible to hold that provisions of it prohibiting coercion, intimidation and terrorism by implication cover the use of nuclear weapons, for the purpose which the Convention is intended to serve is different from that which demands rules for regulating the use of nuclear weapons.

Conclusion.—

It will thus appear in ultimate analysis that the existing rules of International Law are wholly inadequate to meet the situation created by the production of nuclear weapons. The need of the times demands elaborate rules to control the production and to regulate the use of such highly destructive weapons for it will do no good to mankind to point out inconclusive and vague rules in arguments against the use of nuclear weapons. Appeals to justice and humanity are equally futile and a legal theory will be needed to persuade States to give up the production and use of these weapons.

The need for law relating to nuclear weapons — The inadequacy of existing rules of International Law furnishes a plea for formulation of new regulations to deal with the unbriddled production of nuclear weapons. There are other reasons for the demand of new rules in this respect. Mankind has not so far invented anything which may counteract the use of nuclear weapons. States possessing nuclear weapons can use them against those which have none of such weapons without fear of a similar counter-attack while a warfare between States possessing nuclear weapons is bound to be disastrous to both. The political situation in international sphere will improve or worsen according to the interests of the powerful nations. The issue on nuclear weapons has assumed an importance in the present 'cold war' and its solution by political means appears difficult. The theory of disarmament vigorously supported at the end of the last global war failed to control the practice of States. Instead of disarming themselves the big powers are competing with each other in production of destructive weapons. It will not be possible to pursuade the State having a file of atomic weapons to cease to produce more or to destroy their stock of such weapons. It will also not be possible to prevent them from carrying on experiments for finding out more destructive weapons. This is the task of a world political leader. The international lawyer need not be discouraged by the political tension that prevails in the world, for his duty lies in doing his utmost to control the production and use of these instruments of destruction. Although it is true that a legal discussion as to the illegality of the use of nuclear weapons would not have the effect of preventing the States from using these weapons, a systematic effort to bind them by rules and regulations would not be futile. *Schwarzenberger* observes :

"At this point, the first, and most self-denying, duty of the international lawyer is to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or the other the decision on the use of these devices of mechanised barbarism. This is not to imply that the international lawyer should wash his hands of all responsibility in the matter. In order to make his own specific contribution to the tasks ahead he must however remove his own thought barriers—to employ Stephen King-Halls' apt terminology. He must be prepared to defy outmoded conventions of a more secure age and be prepared to consider legal planning as one of the essential social functions he has to fulfil. He must be willing to consider without fear or favour any changes in the structure of existing world society,

however radical'; which may be required to break the vicious circle of our system of world power politics in disguise."[1]

Much Needed Regulations.—Apart from a disarmament plan which pertains to the sphere of politics much is possible in the legal sphere to control the production and use of nuclear weapons. It is possible for law to divert the production of atomic energy from destructive to beneficial uses. What regulations are to be introduced for ensuring peace against atomic weapons is the problem confronting international lawyers. The United Nations Orgainization can tackle this problem provided the big powers desist from exercising their right of veto. In the present political situation the United Nations is unable to effectively regulate the production or the use of the atomic energy. The Atomic Energy Commission established by the General Assembly in 1946 recommended the establishment of an international control agency. It laid down certain principles on the basis of which the production and use of the atomic weapons be controlled by the international control agency. These principles are that (a) decisions concerning the production and use of atomic energy should not be left in the hands of individual nations ; (b) policies that substantially affect world security should be defined by treaty and the agency should be awarded necessary powers and functions to carry out those policies ; (c) nations should grant to the agency, subject to a defined procedure, rights of inspection in any part of their territory ; (d) international agreements to outlaw the national production, possession and use of atomic weapons should be embodied in a treaty containing comprehensive System of Control. These recommendations suggest a scheme which may likely succeed but on account of the tense political situation prevailing in the United Nations nothing so far has been done to establish an international control agency. There can be no doubt that a comprehensive treaty establishing an international control organization with effective powers offers a good solution. But the difficulties arising out of the international political situation are not easily surmountable and the recommendations of the Atomic Energy Commission cannot assume a practical shape. "Yet any such State-like international control organization is precisely what the political realities of present international life rule out. The unintegrated, conflict—donimated, international community, with its weak law, and starkly unequal membership gravitating around the poles of the two hostile

1. Georg Schwarzenberger : Legality of Nuclear Weapons p. 58-59.

Great Powers most advanced in the atomic field is the worst possible setting for any such plan. In this light, the modest result of United Nations efforts in this field is scarcely surprising."[1]

If the establishment of an international control agency is not possible, nations not producing nuclear weapons can combine through multilateral treaties embodying such rules as may not only prohibit the production and use of nuclear weapons but condemn these instruments of destruction. Such treaties would eventually produce a very wholesome effect on States madly engaged in the production of atomic energy. A spirit of real cooperation on the part of such States is bound to bring the desired result. Cooperation and good-will among nations not competing for world dominance will pave the way to a world-federation. Systematic and persistent efforts are necessary to achieve the goal of a world-federation which alone can provide a solution for this difficult problem, *Schwarzenberger*, observes : "In fact however utopian within the existing framework of world politics the federal patern appears to provide the only commensurate constructive answer to the impotence of the parochial State, mistermed 'world power' to protect its citizens against the worst but by no means unlikely risks of a divided world."[2]

It is worthwhile continuing efforts to bring about a better order in human activities, and the horror of destruction created by nuclear weapons should not be allowed to overawe us into inaction. "Treatment, if it be possible at all, calls for an overall review of human relations, the values implied in them and the means of communication for sharing them between man and man and nation and nation. Such an undertaking involves gradual long-term reorientation at numerous points rather than the surgeon's sudden localised knife, or the analgesic quieting of symptoms."[3] It is desirable to go on with efforts for the creation of a world community, in which mankind may find everlasting peace and may feel disturbed by the possibility of a nuclear warfare.

1. Julius Stone.—Legal Controls of International Conflict p. 346.
2. George Schwarzenberger :.The Legality of Nuclear Weapons. p. 59.
3. Julius Stone:—Legal Controls of International Conflicts p. 348.

PART IV
LAW OF NEUTRALITY

CHAPTER LIV

NEUTRALITY

Definition of Neutrality.—Neutrality may be stated to be an attitude of impartiality adopted by a State in relation to a war between two or more other States. It is a status of a State which does not take part in a war going on between some other States. This legal status comes into being only on the outbreak of a war and has no reference to the times of peace. A State adopting an attitude of neutrality in relation to a war is deemed under the International Law to have certain rights and certain duties. Neutrality is thus a bundle of rights and duties both for the neutral State and for the belligerents. There is nothing in International Law which imposes an obligation on a State to remain neutral. It is for the State itself to elect in time of war to be neutral or not. When a State either expressly or by implication signifies its intention to remain neutral it gets certain rights and duties by operation of International Law. We may now consider some well known definitions of the term :—

Oppenheim.—"Neutrality may be defined as the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents, such attitude creating rights and duties between impartial States and the belligerents."[1]

Fenwick.—Neutrality as understood at the beginning of the twentieth century might be defined as the legal position of a State which remained aloof from a war between two other States or groups of States while maintaining certain rights towards the belligerents and observing certain duties prescribed by customary law or by international conventions or treaties."[2]

Starke.—"In its technical sense it (neutrality) is a legal status involving a complex of rights, duties and privileges at International Law which must be respected by belligerents and neutrals alike."[3]

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1. Oppenheim—International Law Vol. II (Seventh Edition) p. 663.
2. Fenwick—International Law (Third Edition) p 611.
3. J. G Starke—An Introduction to International Law (Second Edition) p. 322.

Lawrence.—"Neutrality may be defined as the condition of those States which in time of war take no part in the contest, but continue pacific intercourse with the belligerents."[1]

Kelsen.—"A State is neutral in relation to States involved in a war. The State is neutral as long as it does not take part in this war."[2] According to *Kelsen* the attitude of impartiality which the term 'neutrality' usually implies consists in the fulfilment of specific obligations established by general International Law and codified in the Hague Conventions V and XIII of 1907. The important obligations of a neutral State are 'to refrain from giving assistance to one of the belligerents as may benefit the other,' 'to refrain from granting any facilities whatever for military operations of the belligerents' but not to 'prohibit its own nationals from supplying belligerents with such facilities', to 'prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise or engage in hostile operations against either belligerents to prevent the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations which has been adopted entirely or partly within its jurisdiction for use in war', 'to prevent the belligerents from making use of its neutral territory and its reasources for military purposes during the war', and to prevent each belligerent from interfering with the neutrals' legitimate intercourse with the other belligerent.' *Kelsen* is of the view that a neutral State does not violate any obligation if it enters into war for according to him a State by entering into war terminates its status of neutrality.

Chief features of Neutrality.—As already stated neutrality is a legal status of a State which keeps itself aloof from war that is going on between two States or groups of States. A neutral State has to adopt an attitude of strict impartiality towards the belligerent powers, for if it favours one of the parties to the prejudice of the other it ceases to remain neutral. A deviation from the course of strict impartiality on the part of a State cannot be tolerated by other States. Impartiality implies an obligation not to give any assistance to any party to a war. It also implies an obligation not to refuse to one of the parties to a war, in matters unconnected with war, what it grants to the other. If a State shows more favour to one side than the other, if it excludes the ships of one belligerent from its ports but allows hospitality to the

1. Lawrence—The Principles of International Law p. 582.
2. Hans Kelsen—Principles of International Law p. 81.

ships of the other belligerent it can not be considered to be neutral. The essence of neutrality lies in an attitude of perfect indifference towards the contending powers. What constitutes neutrality of a country was stated into the case of the *Eliza Ann.*[1] This case arose out of the capture of three American ships in Hanoe Bay in August, 1912 by the Vigo which lay there with other British ships of war. Sweden claimed that the seizure being within one mile of her mainland was in violation of its neutral territory. The case put forward by Sweden was that it was neutral, that American ships could not be captured while on its territory and that she was entitled to recover the ships and cargoes. It was denied that Sweden was neutral or that the capture took place within neutral territory. Sir William Scott delivering the judgment observed :—

"In order to give effect to a claim of this kind, it must be shown that the party making it was then (at the time of the act complained of) in a state of clear and undisputable neutrality. If he has shown more favour to one side than to the other, if he has excluded the ships of one of the belligerents from his ports and hospitably received those of the other, he cannot be considered as acting with the necessary impartiality. I do not think a country, showing such an invidious distinction, is entitled to claim the character of a neutral State. The high privileges of a neutral are forefeited by the abandonment of that perfect indifference between the contending powers in which the essence of neutrality consists..............

"It is not to be disputed that the conduct of Sweden towards this country had been, for a considerable time, of a very unfriendly description. Impelled by fear, or some other motive, she had excluded British ships from her ports, and had, either from choice or compulsion adopted that course of policy which has been imposed by the French ruler on the other nations of Europe, and which has been termed continental system. It is clear too, that Sweden acted in this manner not from any private views concerning her own municipal regulations but in execution of a plan auxiliary to the enemy of this country. Sweden therefore, by her conduct, afforded Great Britain a legitimate cause of war, and perfectly justified the seizure of Hanoe by the British Admiral...........

"But in order to give validity to the present claim.......... it must (also) be shown that the place of capture was within Swedish territories and I am of opinion that it was not."

1. (1813) 1 Dods 244.

It is necessary for a proper understanding of the subject to note the following features of an attitude of impartiality taken up by a State in relation to belligerents :—

1. Neutral status comes into being on the notification of an outbreak of war and lasts so long as war lasts or until war breaks out between the neutral State and either of the belligerents.

2. The neutral status of a State has to be recognised by belligerents. Non-recognition of this status by belligerents amounts to violation of International Law.

3. Neutral States are under a duty not to assist actively or passively either belligerent but they are not bound to stop such intercourse with the belligerents as they enjoyed before the war.

4. Neutral States are not precluded from intervening when a belligerent is guilty of violating International Law in carrying on the war.

5. Neutral States have no duty to abstain from carrying on humanitarian activities such as sending of medicine, doctors and other commodities for the sick and the wounded of the war. They are permitted to be sympathetic towards one belligerent without violating their neutrality.

Kinds of Neutrality.—Neutrality may assume different forms. According to *Oppenheim* important kinds of neutrality are :—

1. **Perpetual or Permanent Neutrality.**—This attitude of neutrality is adopted by a State by means of a special treaty and lasts both in time of peace as well as in war. The State which is permanently neutralized has the same duties and rights as other neutral States. Switzerland is an example of a permanently neutralized State.

2. **Partial Neutrality.**—Neutrality is partial when only a part of a State is neutralized *e. g.*, the Ionian Islands of Corfu and Paxo which are parts of Greece.

3. **General Neutrality.**—It is neutrality of a State no part of which is neutralized by a treaty.

4. **Voluntary Neutrality.**—It is the neutrality of a State by its own choice and not in compliance with the terms of an agreement or treaty.

5. **Conventional Neutrality.**—When a State remains neutral by force of some treaty obligation its neutrality is conventional.

6. **Armed Neutrality.**—It is armed neutrality when a neutral State takes military measures to protect its neutrality against possible violations by either belligerents.

7. **Benevolent Neutrality.**—There is at present no scope for this kind of neutrality which represents an old idea. In the past a State was permitted to adopt benevolent neutrality by favouring one of the belligerents and yet remaining neutral. This neutrality is not now possible, as it means an abuse for it will allow to one side privileges denied to the other.

8. **Perfect or Absolute Neutrality and Imperfect or Qualified Neutrality.**—The distinction between perfect and imperfect or qualified neutrality is very important from the practical point of view. A State is said to be perfectly or absolutely neutral when it does not render any assistance to either belligerent either directly or indirectly, either actively or passively. Perfect or absolute neutrality implies an attitude of strict impartiality. Neutrality is said to be imperfect or qualified when a State while remaining neutral on the whole gives some assistance directly or indirectly to either belligerent in compliance with the terms of an existing treaty.

Although in the early stages of the development of law the concept of qualified neutrality gained some recognition, the attitude of impartiality which the term 'neutrality' in International Law connotes does not postulate that a State not at war should prescribe its own obligations as a neutral according to its interest in the success of one belligerent rather than the other.

In the eighteenth century the distinction between absolute and qualified neutrality was well recognised and a State while remaining neutral was free to give assistance to one of the belligerents under a previous treaty by which it was bound.

The concept of qualified neutrality found expression in a number of cases which took place in the eighteenth and nineteenth century In 1778 the United States of America and France entered into the Treaty of Amity and Commerce whereby the former permitted French privateers and their prizes admission into its ports during war and bound itself to refuse admission into its ports the privateers of the enemy of France. This treaty gave rise to a qualified neutrality on the part of the United States of America. In 1873 when war was going on between Great Britain and France the French the privateers were admitted into American ports. Great Britain complained of this admission but the United States of America justified its action on the ground of its obligations under the Treaty of 1778. Similarly, a treaty was arrived at between Denmark and Russia in 1781. Denmark under this treaty undertook to supply men-of-war and troops to Russia in war. During war between Russia and Sweden in 1788 Denmark declared itself neutral but supplied men-of-war and troops to Russia. Sweden made a protest but later on acquiesced and did not direct her war operations against Denmark. Another case of qualified neutrality is furnished by the action of Great Britain in allowing export of arms to Denmark and prohibiting similar export to Germany during war between Germany and Denmark in 1848.

In the latter half of the nineteenth Century the concept of qualified neutrality was opposed by many writers who maintained that a State was to be either neutral or not at all and a neutral State which assisted a belligerent under the terms of a previous treaty was guilty of violation of neutrality. There were some writers, *e. g.*, *Heffter*, *Wheaton*, *Bluntschli* and *Helleck* who favoured the view that a neutral State did not violate neutrality if it acted in performance of previous treaty obligations This controversy continued till the out-break of the First World War. Some instances of qualified neutrality during the First World War are available. Greece though a neutral State did not oppose the landing of British and French troops at Salonika which was a port of neutral territory Similarly Costa Rica while remaining neutral laid her ports and waters open for the use of the navy of the United States of America in 1917. When United States after shaking off its neutrality got itself involved in war against Germany; many American States which were neutral in their attitude gave support and cooperation to the United States. In April 1917 Guatemala after breaking off diplomatic relations with Germany offered her ports, waters and railways

for use in what it termed as common defence. Soon after Uruguay in sympathy with the United States made a declaration that an American State commencing hostilities with the States of the other continent in its self-defence would not be regarded as a belligerent of the World War.

The concept of absolute neutrality was shaken to its foundations on the conclusion of the Covenant of the League of Nations and the Kellog-Briand Pact. The Covenant established a system of collective security with economic sanctions and made it impossible for the Members of the League to maintain an attitude of strict impartiality.

The Kellog-Briand Pact indirectly affected the concept of absolute neutrality by conceding a right of self-defence to the parties to the Pact other than the party which resorted to war as a measure of national policy. Both the Covenant and the Pact ruled out the possibility of an attitude of absolute impartiality on the part of a State.

The events leading to ruthless violations of neutrality during the Second World War marked the disappearance of the concept of absolute impartiality on the part of the States which did not really want to take part in war but which could not refrain from joining in the collective effort to end war and bring about peace. The attitude of the United States of America which was neutral in the beginning suffered a gradual change with the progress of the war events .Ultimately, on finding that overwhelming danger was facing it and other nations, it threw itself into war to prevent Germany from reaching its goal of world domination. The various steps taken by the United States of America before it involved itself into war were the result of its assertion of the changed character of neutral duties. The Land-Lease Act passed to promote the defence of the United States in permitting the sale, exchange, lease, lend or otherwise dispose of any article of defence to the Government of any country whose defence the President considered vital to the defence of the United States was based upon the principle of qualified neutrality. The German attack on American vessels engaged in supplying commodities to Great Britain obliged United States to issue such instructions to its navy as were inconsistent with an attitude of absolute impartiality. The German attack of the Greer, a destroyer belonging to the United States, aggravated the situation as it resulted in an announcement by the President that German and Italian vessels would enter American waters 'at their peril.' These

steps which were wholly inconsistent with an attitude of neutrality found retaliation in a declaration of war by Germany against the Uuited States of America on December 11, 1941. These steps taken by the United States may be justified on the principle of self-preservation and on the ground that Germany having ruthlessly broken the Kellog-Briand Pact committed acts of gross aggression against neutral States. But Germany saw no justification and made the declaration of War.

The Charter of the United Nations at the close of the Second World War rendered almost useless the concept of absolute neutrality. The Member States of the United Nations cannot in view of the obligation imposed upon them by the Charter adopt an attitude of perfect impartiality. Although the Charter does not abolish neutrality; it admits of only a qualified neutrality on the part of the Member States. It is now idle to speak of an absolute or perfect neutrality in a world over-shadowed by the United Nations Organization.

Neutrality and Neutralization.—It is important to bear in mind the distinction between neutrality and neutralization. A neutralized State becomes neutral for all future time as a result of a guarantee made under an International Convention of the Powers. A neutralized State is generally a weak State which does not want to take a part in international politics. Neutrality is by choice while neutralization is enforced. A neutral and neutralized State both adopt an attitude of neutrality. A neutralized State adopts an attitude of neutrality in enforcement of the terms of an international agreement while a neutral State does so willingly and freely. Neutralization brings about enforced neutrality for a neutralized State is bound either not to fight except in self-defence or to abstain from doing such acts as are forbidden by an international agreement. In order that a State may become neutralized it is necessary that all the States likely to be affected should consent to neutralization. Usually the Great Powers enter into a treaty for the purpose of neutralizing a State. The main terms of a treaty of neutralization consist in the agreement on the part of the neutral State undertaking not to take part in a war except in self-defence and to refrain from entering into any agreements which might improve it in a war or, deprive it of its territory coupled with a guarantee on the part of the Great Powers to safeguard the independence and territorial integrity of the neutralized State. A neutralization treaty aims at imposing neutrality on a State and the

neutralized State is bound to observe such neutrality as is laid down in the treaty.

Neutrality is a temporary status of a State during a war while neutralization confers a more or less permanent status. The act of neutralization whereby a permanent status of neutrality is imposed on a particular State carries a guarantee on the part of a limited number of powers and also a corresponding obligation on the part of the neutralized State to remain neutral. Neutrality under International Law is a mere temporary phase with no specific guarantees on the part of the Great Powers and no corresponding obligation on the part of the neutral State. It has its sanctions of International Law while neutralization depends on the express agreement.

The neutrality of Switzerland was accomplished by Article LXXXIV of the Final Act of the Congress of Vienna of June 9, 1815 which was confirmed by a declaration made at Paris on November 20, 1815. The Powers which signed the declaration of Vienna of March 20, 1815 recognised the perpetual neutrality of Switzerland and guaranteed to it the inviolability of its territory. During the First World War the neutrality of Switzerland was respected. The Covenant of the League of Nations did not impose an obligation on Switzerland to take part in war in defence of the Covenant. The Second World War also respected the neutrality of Switzerland. Similarly, the neutrality of Belgium was confirmed by the Treaty of London of April 19, 1839 whereby Belgium was to form an independent and perpetually neutral State. Both Great Britain and Germany recognised the binding force of the Treaty of London in the First World War. The German Government however regarded the obligation impossible to be performed in the presence of a "state of necessity". After the First World War the King of Belgium on October 14, 1936 declared that the neutralization of Belgium was at an end. This declaration was confirmed by Article 31 of the Treaty of Versailles and the Treaty of London stood abrogated with the result that Belgium found itself free from the burden of neutralization. Belgium is now a member of the United Nations and is under the obligations of the general system of collective security established by the Charter.

Modern Concept and the History of its Development.– The legal conception of neutrality as it exists today was unknown in ancient times when belligerents did not recognise an attitude of impartiality on the part of the third States. War in those days meant some action either direct or indirect from

third States. The ancient States had no idea of impartiality in a war between two of them. Their jurists had no word to express an idea of impartiality with respect to a war. What is now known as neutrality in International Law is of recent origin. The idea of impartiality known to us could hardly be conceived in a feudal system of Government. In the Middle Ages States found it necessary to enter into bilateral treaties providing that neither of the contracting parties would assist in war an enemy of the other. After the fall of the Holy Roman Empire rulers of the various States found it necessary to safeguard their interest to enter into treaties in anticipation of coming wars. These treaties brought about the idea of impartiality of third States and formed a basis for further development of this legal concept. The maritime codes of the Middle Ages mark a beginning of the rules governing neutral commerce. During this period the words '*medii*', '*amici*' and '*pacati*' which the Romans had for the first time used to convey the idea of a neutral remained in vogue. Although these words were of very doubtful import they expressed a concept peculiar to those times.

The sixteenth century saw the recognition of neutrality as an institution of International Law. The theologians having enunciated the principle of just and unjust war however did nothing towards the development of this concept. *Grarius* used the Roman word *medii* to express the idea of neutrality and devoted a chapter to it in his book *de jure belli ac pacis*. *Bynkershoek* used the word '*non-hostes*' to express the same idea. The words 'neutral' and 'neutrality' appeard in the seventeenth century in Latin and German. *Vattel* found these words as appropriate to describe the important concept in International Law.

Grotius gave the concept a moral basis and declared : "It is the duty of neutrals to do nothing to strengthen those who are prosecuting an unjust cause or which may impede the movements of him who is carrying on a just war......................But if the cause is a doubtful one they must manifest an impartial attitude towards both sides, in permitting them to pass through the country, in supplying their troops with provisions, and in not relieving the besieged." It would appear that *Grotius* does not lay down equality of treatment on the part of a neutral. He wanted third States to judge whether one or the other belligerent had a just cause for war and to lend its support to one who had a just cause. The law as to neutrality was in its infancy and although the

rule of impartiality had its recognition it was frequently broken and belligerents did not respect the neutrality of third States. Inasmuch as it was difficult in those times to keep up an attitude of impartiality it was common for the States to enter into treaties with the stipulation that the contracting parties would remain neutral in wars against either of them. This practice of entering into treaties continued up to the middle of the seventeenth century. Thereafter it came to be accepted that a neutral could not be permitted to give assistance to either belligerents except when it was bound under the terms of a treaty made before the war.

It was not until the 18th century that it was widely recognized that the neutral States were to remain impartial and the belligerents were under a duty to respect their neutrality *Bynkershoek* (1673-1743) did not agree with Grotius on the idea of a just and an unjust war. He used the word 'non-hostes' to express the idea of a neutral. He observed thus "The justice or injustice of a war does not affect a common friend. It is not for him to place himself as judge between the two belligerents who are the one and the other his friends......If I am neither on one side nor the other, I cannot aid the one in such a way as will hurt the other." It is apparent that *Bynkershoek* laid emphasis on strict impartiality and ruled out from consideration justice or injustice of the cause. Another jurist of importance who moulded the legal thought was *Vattel* who used the words neutre and neutralite to express his idea of neutrality. Both *Bynkershoek* and *Vattel* greatly influenced the legal thought of that time in giving the concept of neutrality a good legal basis. *Bynkershoek* discarded the idea of just or unjust war and manitained that a neutral State was a friend to both the belligerents and that it was not required to act in a way which may assist one of the belligerents and hurt the other. *Vattel*, a Swiss, being naturally zealous in supporting the idea of impartiality described neutral States as those who took no one's part, remaining friends to both parties and not favouring the armies of one of them to the prejudice of the other. The idea of impartiality implicit in the legal concept of neutrality found its supporters in the leading maritime States of those times who in the best interests of their commerce favoured to remain neutral. Inspite of the fact that it was generally accepted that neutral States were to adopt an attitude of impartiality without concerning themselves with the just or unjust cause of either belligerent, there was no strict compliance of the rule and instances are many where the neutral States rendered assistance to one

of the belligerents. In practice neutral resources continued to be utilized by either belligerent and neutral territory remained to serve as passage of troops of the belligerents. But these violations against neutrality could not escape protests and the wrong-doers were in many cases called to make reparations. The States became conscious of the institution of neutrality with its implications of impartiality. Towards the close of the century the law relating to neutrality was still doubtful in many respects. It was no doubt agreed by that time that a neutral giving aid to one of the belliegerents in pursuance of a prior agreement was guilty of violation of neutrality. *Hall* observed: "It was not until 1788 that the right of a neutral State to give succour under treaty to a belligerent gave rise to serious, if to any, protest. Denmark while fulfilling in favour of Russians an obligation of limited assistance contracted under treaty, declared itself to be in a state of amity with Sweden. The latter power acquiesced as a matter of convenience in the continuance of peace, but it placed on record a denial that the conduct of Denmark was permissible under the Law of Nations. Probably Sweden stood alone in her view as to the requirements of neutral duty." This state of affairs encouraged during war between England and France in 1793. M. Genet, the French Minister to the United States in asserting his right to fit out and commission privateers in the country to which he was accredited. He, after causing French privateers to be fitted out in American ports despatched them to capture British vessels engaged in commerce. Not only this he set up prize courts on American soil. Great Britain complained on the ground that these acts were derogatory to the sovereignty of the United States. The United States which was neutral made a strong protest against the assertion of such right and declared that it was:

> "The right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring Powers; that the granting of military commissions, within the United States, by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own Country."

Besides making the above bold declaration the Government of the United States took active steps to prevent violation of

its neutrality. M. Genet paid no heed with the result that the United States demanded his recall. The French Government dismissed M. Genet and ordered his successor to disarm the privateers which had been fitted out in the United States and removed the consuls who had set up the Prize Courts. The strong attitude taken up by the United States gave to the world an understanding of the rights and obligations of neutral States and this marked a sure step towards the development of the institution of neutrality. Although the duty of impartiality was gaining sure ground, precise rules on many matters were still absent. Moreover there were no uniform rules with regard to the treatment of neutral vessels engaged in trade with belligerents.

France and Spain followed the rule that neutral goods on enemy ships and enemy goods on neutral vessels could be seized by belligerents. Great Britain, on the other hand, followed the practice that enemy goods on neutral vessels could only be seized and neutral goods on enemy ships was not liable to be seized by belligerents. As to the righs of trade of neutral States during war, Great Britain recognised the principle that neutral States had the right to carry on such trade with belligerents as it carried on in time of peace.

First Armed Neutrality.—In 1780 during the war between Great Britain on the one hand and America, France and Spain on the other, Russia proclaimed what is known as the "First Armed Neu- trality" and enunciated five principles.

(1) that neutral vessels should be permitted to go un-harmed in the ports and coasts of the belligerents;

(2) that belligerents could not seize any enemy goods except contraband goods on neutral vessels ;

(3) that the rule as to contraband contained in the Treaty, existing between Great Britain and Russia was to be applied in all cases ;

(4) that a port where the belligerent had stationed vessels should only be deemed to be blockaded ;

(5) that these principles should be applied in the proceedings and judgments on the legality of prizes.

Following this proclamation Russia entered tnto• treaties with Denmark, Sweden and other States for the purpose of enforcing these principles and equipped a number of men-of-war. America, France and Spain accepted these principles

but did not enter into a formal treaty. Great Britain did not concede. The Frist Armed Neutrality besides furnishing a basis for further development failed to achieve the desired result. Russia itself defied these principles when in 1793 she joined Great Britain to interdict all neutral navigation into French ports and justified her action on the ground that the war waged by France was a menace to the peace and security of the whole world.

Second Armed Neutrality.—Russia could not remain long with Great Britain for when in 1800 Great Britain refused to concede immunity to neutral vessels under convoy from visit and 'search, Russia proclaimed the Second Armed Neutrality and entered into treaties with Sweden, Denmark and Prussia for that purpose. This Second Armed Neutrality was based on the five principles of the First Armed Neutrality and one more principle to the effect that belligerents would not exercise their right of visit and search neutral merchantmen under convoy if a declaration to the effect that the vessel did not contain contraband of war had been made by the commander of the men-of-war under whose convoy the neutral vessels were sailing.

This Second Armed Neutrality did not last long though it led to a compromise between Russia and Great Britain resulting in a Maritime Convention whereby Great Britain recognised the rule that neutral vessels might navigate from port to port, and on the coasts, of the belligerents and that there should be an effective blockade. Russia on her part conceded to the principles that enemy goods on neutral vessels could be seized and that neutral vessels under convoy were subject to the right of visit and search by men-of-war. On the outbreak of war between Great Britain and Russia in 1807 this Convention fell to the ground and search party proclaimed its adherence to its original principles.

The failure of the Maritime Conventions did not however retard the development of the concept because of the happening of certain other events. The United States did not rest content after it had made the declaration during war of 1793 between England and France and 'strong protest against the conduct of M. Genet which was incompatible with the territorial sovereignty of the United States' but continued its efforts towards a better definition of the rights and duties of the neutrals and the belligerents. The proceedings taken by the United States from 1793 to 1818 stand as a land-mark in the development of the law relating to neutrality. The American Neutrality Code of 1794 is one of the first clear expositions of

the modern conception of the various obligations of the neutrals and the belligerents. The Foreign Enlistment Act containing provisions which were meant to be permanent was passed on April 20, 1819. England also enacted law on neutrality on the American lines in the same year.

The attitude taken by the United States in 1793 did not suffer a change even in Nepoleanic wars. The duty of strict impartiality of the neutral State emphasized in its declarations and practice from time to time gave the nations an assurance of the fact that neutrality in strict sense was possible and most desirable. Nations began to undestand that the action of the belligerent in organizing a military expedition on neutral soil was in derogation of the superemacy of the territorial sovereign and that such an action could not be permitted by the neutral. It was also recognised that the neutral territory could not be employed as a base for military or naval operations. The historical events of the ninteenth century were favourable to the development of the rules relating to neutrality.

The various disputes that arose between America and Great Britain in connection with the attitude of neutrality taken up by the former led to enunciation of legal principles concerning neutrality. The permanent neutralization of Belgium and Switzerland was another factor which favoured the development of the law. The Crimean War of 1854 gave rise to some changes in the practice of States on the question of rights and duties deriving from neutrality and at the conclusion of the war came the epoch-making Declaration of Paris (1856) which laid down the rules :—

(1) that privateering be abolished ;

(2) that neutral flag covers enemy goods with the exception of contraband ;

(3) that neutral goods on enemy vessel are immune from seizure ;

(4) that blockades should be effective.

Neutrality in 20th century.

The present century began well and its first decade saw the formulation of numerous rules relating to neutrality and re-assertion of some of those principles which had already been accepted. The Second Hague Peace Conference met in 1907 and produced two Conventions on neutrality. Convention V contained rules relating to rights and duties of neutral States in war on land while Convention XIII related to rights

and duties of neutrals in naval war. These Conventions aimed at codifying the law on neutrality and brought out into prominence the idea of strict impartiality. Many controversial issues were left unsettled. The other event of this period was the London Naval Conference (1908-1909) wherein important matters relating to neutrals were discussed and compromise agreements reached on many a matter. The document contain ing the agreed rules is known as the Declaration of London (1909) which though unratified embodies sound principles for guidence of both the neutrals and the belligerents on matters which were controversial. The Hague Conventions and the Declaration of London put together made a complete code embodying the law relating to neutrality.

The First World War which broke out in 1914 provided a good occasion for the application of the law relating to neutrality which had developed slowly during the course of about three centuries. It was a severe test to which neutrality was put in 1914 and the following years of war. The unfortunate events of this war reduced all law of war and neutrality to a mockery.

The establishment of the League of Nations was incompatible with the traditional law of neutrality. The Covenant of the League made it impossible for a member State to adopt an attitude of impartiality and to take no part in the common defence of the victim of an aggressive war. Then followed the Kellog Briand Pact which though aimed at preventing wars in future had an effect of modifying the traditional view on neutrality.

In 1931 when Japan invaded Manchuria it was declared by Stimson of the United States that under the covenants of the Kellog Briand Pact the conflict was the concern of every body connected with the Pact and that the attitude of strict impartiality was not possible to be adopted. This modified view of neutrality could not be tested as Japan did not declare war. The concept of neutrality as it stood modified by the Covenant of the League was accepted expressly at the Habana Conference of 1928 which adopted a convention on Maritime Neutrality according to which the signatories were free to discharge their obligations under international agreements. Thereafter came into existence the Argentine Anti-war Treaty of Non-aggression and Conciliation of 1933 which imposed upon the contracting parties in case of aggression on the part of one of them, 'to adopt in their character as neutrals a common and solidary attitude' subject to their duties under the collective treaties.

This principle was reasserted in the Convention to Coordinate, Extend and Assure the Fulfilment of the Existing Treaties between the American States adopted at Buenos Aires in 1936.

These events influenced the jurists both of Europe and America and a sharp controversy arose as to whether the attitude of impartiality was consistent with the obligations under the Covenant of the League and Pact of Paris. Some of the jurists held the view that the adoption of an attitude of impartiality was tantamount to violation of the Covenant and the Pact. There were many others who maintained that it was possible for a State to be neutral and yet be able to discharge the obligations of collective responsibility imposed by the Convention and the Pact A group of American jurists were of opinion that States should adhere to the traditional neutrality as it was impossible for them to distinguish between the just and unjust cause of a belligerent.

In the meantime the clouds of war were gathering on the horizon and the United States alive to the impending danger had to make successive laws to prevent itself from being involved in the coming war. In 1934 it authorised its President to lay an embargo against Bolivia and Praguay if he thought that such a course would lead to peace between the two countries. In August 1935 another law made it unlawful to export arms and ammunition from the United States to any belligerent port or to any neutral port for transhipment to the belligerent country after the President had declared that war between two or more foreign powers was in existence. In May 1937 yet another law put a 'Cash and Carry' plan into effect. By this law it was promised that certain commodities specified by the President must not leave the country unless their price had been previously paid and must be transported in the vessels of other countries.

Then came thundering the Second World War and the traditional view of neutrality gained the field for a short time. Many States proclaimed their neutrality and the belligerents took steps to enforce usual restrictions on neutral trade and for some time acted within the limits prescribed by law. President Roosevelt on the outbreak of war declared that the provisions relating to embargo on arms of the Act of 1937 ill-fitted with the attitude of impartiality and that it was desirable to revert to the traditional neutrality. But the events that followed compelled the United States not to adhere to traditional neutrality or even to any sort of neutrality. The German violation of neutrality of Norway, Denmark, Holland, Belgium and

Luxemburg the collapse of France, the entry of Italy into war and the German acquisition of wide areas adjacent to the English Channel and the North Sea raised a great apprehension that the safety of the United States was in peril. The United States yielded to Britain in giving an assistance which was contrary to the duties of neutrality as declared in the Hague Convention of 1907.

The Hague Convention of 1907.—The Second Hague Peace Conference which met in 1907 adopted two conventions directly dealing with neutrality. Convention V dealt with the Rights and Duties of Neutral Powers in war on land while Convention XIII regulated the Rights and Duties of Neutral Powers in Naval War. Although these two conventions were not ratified by Great Britain theyconstitute a valuable statement of law relating to neutrality. Most of the States adopted in practice the rules laid down by these conventions The strict attitude of impartiality has throughoutbeen maintained in these conventions. These Hague Conventions are important in so far as they aim at defining precisely the rules relating to neutrality. As Convention XIII did not resolve all the controversies arising on several questions relating to rights and duties of neutrals in naval war, it was found necessary to call another conference. A Naval Conference met at London and produced the famous Declaration of London in 1909.

Declaration of London.—This was a code of rules relating to blockade, contraband, unneutral service, destruction of neutral prizes, transfer to neutral flag, enemy character, convoy resistance to search and compensation. During the Turco Italian War which broke out after this Declaration the belligerents complied with the rules of the Declaration. In the First World War the United States asked the belligerents to adopt this Declaration. Great Britain, France and Russia signified their willingness to adopt it with certain modifications. Germany agreed to adopt it provided its enemies adopted it. For sometime the Declaration was acted upon in part. After 1916 the Declaration was not obeyed during the rest of the First World War.

Since the Declaration of London was not ratified its validity might be denied but there is no doubt that ever since it was made it has been referred to in cases where its rules are applicable. In the case of the Cysne (1930) before the Special Arbitration Tribunal between Germany and Portugal it was agreed by the parties that though the Declaration had not the force of a treaty it amounted to a code embodying recognised

principles of International Law. The Tribunal in accordance with Article 38 of the Statute of the Permanent Court of International Justice relied upon the Declaration of London as a Convention 'establishing rules expressly recognised by the contesting States" Similarly, the Permanent Court of Arbitration in the case of the *Carthage* (1913) was called upon to decide the case on a consideration of the provisions contained in the Declaration of London. A review of the various cases coming up before the courts and the tribunals involving matters dealt with by the Declaration will show that the Declaration was accepted as a codification of the recognised rules relating to neutrality.

First World War.—The law relating to neutrality was put to test during the First World War in which all the Great Powers and several other States participated. At the outbreak of the war, several States which were outside the conflict in the beginning made declarations of their neutrality. Although United States announced that 'it was on terms of friendship and amity with the contending Powers', it could not remain neutral for a long time and had to join war in 1917,when it felt that it was difficult to keep its neutrality intact against the attacks of both Great Britain and Germany. A close study of the various events happening during this war will make it clear that the rules of neutrality so far settled relating to naval warfare proved ineffective and neutrality had come to end. The laws relating to blockade and contraband were ruthlessly violated and neutrality fell from that high pedestal which it had reached after a long struggle.

Neutrality under the Covenant of the League of Nations.—The Covenant imposes an obligation on the Members of the League 'to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'. The Covenant further declares that 'any war or threat of war, whether immediately affecting any of the Members of the League or not, is a matter of concern to the whole League.' These provisions imposed an obligation on the Members of the League not to adopt an attitude of impartiality with respect to a war but to take steps to defend it. The Members of the League undertook to be responsible for collective defence and preservation of peace. Moreover, Article 16 of the Covenant besides providing for economic sanctions in case a war was resorted to by a Member declared that a Member which began a war in disregard of the Covenant, would be

deemed to have committed an act of war against all other Members. Taken in its literal sense this provision put an end to all neutrality inasmuch as the applicability of the sanctions provided for by the Article is inconsistent with the attitude of strict impartiality.

According to *Fenwick* the Covenant of the League of Nations put an end in principle to the traditional law of neutrality.[1] *Oppenheim* has taken a different view when he observes: "Accordingly, it was inaccurate to assume that the Covenant had abolished neutrality. Nor was it true that it had not affected neutrality at all. The correct view was probably that while in some cases, namely, where resort to war was not contrary to the Covenant, the latter had not altered the law of neutrality, it had, without abolishing it, vitally affected it in those cases in which Members of the League were bound or authorised to apply sanctions under Article 16 of the Covenant."[2]

Kelsen regards the economic sanctions which a member was obliged to take even if it did not itself resort to war against the delinquent State as inconsistent with its obligations as a neutral State.[3]

The Kellogg-Briand Pact.—In 1928 a multilateral Treaty for the Renunciation of war known as the Pact of Paris or the Kellogg-Briand Pact was concluded for the purpose of preventing recurrence of war. This Pact imposed an obligation on the contracting parties to renounce war as an instrument of national policy in their relation with one another.

The Pact did not however provide for measures of enforcement of this obligation and also was silent upon the right of self-defence of the contracting parties. By this Pact the contracting partices only agreed not to resort to war as an instrument of national policy, and they did not in any way limit their right of self-defence. Apparently there was nothing in the terms of the Pact which took away or altered the rights and duties deriving from neutrality or put an end to neutrality, the Pact had the effect of modifying the law relating to neutrality. By reason of the reservation of their right of self-defence

1. Fenwick—International Law, (Third Ed.) p. 613.
2. Oppenheim—International Law Vol. II (Seventh Ed.) p. 645.
3. Hans Kelsen—Principles ot International Law. p. 86.

the contracting parties to the Pact other than the party resorting to war had the right to take steps to repulse war in self-defence thereby deviating from the attitude of strict traditional impartiality. Moreover, resort to war as an instrument of national policy by one of the contracting parties amounted to a breach of the Pact giving rise to the other parties to the Pact a cause for taking effective measures open to them under the International Law against the guilty party. The measures thus taken were bound to conflict with the attitude of impartiality. As to the effect of the Pact on neutrality *Kelsen* observes :—

> "Thus the obligation of a neural State, that is State not involved in the war between other States, to adopt an attitude of strict impartiality towards the belligerents is not valid in the relationship among the parties to the Pact in case of a war waged as an instrument of national policy."[1]

The Pact while changing the attitude of nations towards war had the effect of modifying the traditional view on neutrality. A few years after this Pact the political situation in Europe indicated that renunciation of war as provided for in the the Pact was not possible. The States alive to the situation adopted measures to safeguard their neutrality. The United States of America passed Neutrality Acts whereby restrictions upon their intercourse with belligerents were imposed. Not content with these Neutrality Acts the United States and twenty more American Republics adopted a General Declaration of Neutrality thereby framing rules of neutrality to be observed during the next European war. Four Scandinavian States agreed upon a code of rules relating to neutrality. Belgium, Holland and Switzerland made assertion of their neutrality. The Second World War came soon thereafter and disillusioned the States which had proclaimed their neutrality.

Neutrality in the Second World War.—On the outbreak of the war in 1939 the tratitional theory of neutrality came into play for a short time. The States outside the war in the beginning proclaimed their neutrality in usual forms and took steps consistent with their attitude of impartiality. This state of affairs could not continue for a long time and the ruthless violation by Germany of the neutrality of Belgium, Holland, Denmark and Norway in 1940 was a wide awakening to hard

1. Hans Kelsen—Principles of International Law, p. 87.

realities. History repeated itself and what happened in the First World War recurred, that is, neutrality came to an end. Two measures were adopted by the United States for 'continental defence in face of great danger'. The first act was to tansfer fifty over-age destroyers to Britain and the second measure was to enact the Lendlease Act which authorised the President to manufacture "any defence article for the Government of any country whose defence the President deems vital to the defence of the United States" These two measures had the effect of destroying the neutrality of the United States. Shortly thereafter the United States forbade the entrance of German and Italian vessels in waters which were necessary to be protected for self-defence and thus violated the traditional law of neutrality. Ultimately in 1941 the United States entered into war. Neutrality thus stood at its lowest ebb.

Neutrality under the United Nations.—Article 2 of the Charter of the United Nations imposes an obligation on the Members to give the United Nations every assistance in any action it takes in accordance with the present Charter and to refrain from giving assistance to any State against which the United Nations have taken preventive or enforcement action. This obligation is inconsistent with the duty of impartiality deriving from neutrality. Again, the Security Council in view of any threat to peace is authorized to make recommendations or take a decision as to the enforcement measures. The Charter makes it obligatory on all Members to accept and carry out all decisions taken by the Security Council. The effect of this provision is that a member of the United Nations which is aloof from the war waged by another member has to give direct assistance in enforcement measures if decided to be taken by the Security Council. It would thus appear that a member cannot in such circumstances follow the traditional path of neutrality. Moreover the principle of maintenance of peace and security by collective action pervading throughout the Charter renders it almost impossible for any member to be neutral and impartial. There is nothing in the Articles of the Charter respecting the right of a State to be neutral, but the directive principles and the purposes expressed in the Charter exclude the admissibility of the status of neutrality in relation to the Member of the United Nations. *Fenwick* observes : "The adoption of the Charter of the United Nations on June 26, 1945, finally marked the end of neutrality as a legal system."[1] *Kelsen* holds the opinion that in view of the provisions of Articles 2 and 5, the Charter

1. Fenwick—International Law (Third Ed.) p, 621.

supersedes the rule of general International Law concerning neutrality in relation to the members of United Nations. His view further is that if the Charter is deemed to have the character of general International Law in relation to non-member States the legal institute of neutrality has to be considered as abolished.[1]

Oppenheim holds a differrent view as to the effect of the Charter on neutrality when he observes : "While the Charter has affected in a decisive way the right of the Members of the United Nations to remain neutral, it has not substantially abolished their right to neutrality either in wars between Members of the United Nations or in wars between non-Members or between Members and Non-Members. In principle no Member of the United Nations is entitled, at its discretion, to remain neutral in a war in whlch the Security Council has found a particular State guilty of breach of peace or of an act of aggression and in which it has called upon the Members of the United Nations concerned either to declare war upon that State or to take military action indistinguishable from war."[1] The position according to *Oppenheim* may be stated briefly as follows :—

1. If the Security Council finds that there is a war involving a Member or a non-Member it may take enforcement measures short of war as laid down in Article 41 of the Charter or it may make use of the armed forces as provided in Article 42. In case the Security Council takes only enforcement measures short of war as provided in Article 41 in which all or some of the Members take part, the Members maintained only qualified neutrality but not absolute neutrality or neutrality in the strict sense.

2. But if the Security Ceuncil takes action under Article 42 and directs Members to use armed forces against the aggressor, the Members lose their neutrality in so far as they have in fact taken the action required of them.

3. In view of Article 48 the Security Council may require all or only some Members to participate in action proposed to be taken under Articles 41 and

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1. Hans Kelsen—Principles of International Law p. 89.
2. Oppenheim—International Law Vol. II (Seventh Ed.) p. 647.
3. Oppenheim—International Law Vol. II (Seventh Ed.) p. 648-651

42. If only some of the Members are required to take action, the other Members who are not so required to participate in the action will be at peace with the aggressor or at least in a state of non-belligerency in relation to it.

4. In cases where the Security Council has determined that a State has been guilty of breach of the peace or an act of aggression but it is unable to reach a decision as to the enforcement action to be taken, the Members are not obliged to relinquish their neutrality in relation to the aggressor.

Commencement and end of Neutrality.—The attitude of impartiality can be adopted by a State only when it gets knowledge of the existence of war between two or more other States. It is the knowledge of the war that gives an opportunity to non-contending States to elect to be neutral or not. The knowledge of war is brought to non-contending powers either by a declaration of the outbreak of war on the part of the contending powers or by some other means which are reliable. The Hague Convention III makes it obligatory on the contending powers to send a notification to neutral powers. It also enacts that the neutral powers do not become subject to the duties deriving from neutrality until after receipt of the notification unless it was established beyond doubt that they had knowledge of the outbreak of war. The State on getting knowledge of the outbreak of war has to make its intention to be neutral and to take active steps for maintenance of this status. The declaration of neutrality acquiesced in by the belligerents clothes the State with the status of neutrality and renders it subject to all the duties deriving from neutrality and entitles it to all the rights which International Law concedes to a neutral. The neutrality of a State commences with its declaration of its intention to remain neutral.

Although no legal duty rests upon a neutral State to make a formal proclamation of its neutrality it is generally made known to the belligerents that a particular State adopts the attitude of impartiality.

At the outbreak of the Second World War nearly all the States which wanted to be neutral communicated their intention to the contending powers. In a civilwar also the attitude of impartiality can be taken up by a foreign State. The existence of a state of belligerency is necessary for a status of

neutrality and until the foreign State recognises the insurgents as belligerents it cannot adopt an attitude of neutrality. A foreign State becomes either neutral or a party to the war after it has recognised the insurgents as a belligerent. If it becomes neutral, it becomes entitled to all the rights and liable for all the duties deriving from neutrality. The neutrality, in the case of a Civil War, commences from the fact of recognition of the insurgents as belligerent.

A State on the declaration of its intention to be neutral becomes burdened with all the obligations which International Law imposes upon it. In order to discharge these obligations the neutral State has to devise and apply its own methods and the procedure that it adopts is a domestic matter and is of no concern to International Law. The neutral States generally enact neutrality laws to insure that its agents and servants as well as governmental organs act in a manner consistent with its attitude of impartiality.

The *cessation* of war marks the end of neutrality. Neutrality also ends when the hitherto neutral State joins one of the belligerents in the war. Violation of neutrality does not *ipso facto* constitutes the end of neutrality, but a grave violation of neutrality may lead one of the belligerents to commence war against the neutral State.

Neutrality and its Justification.—The concept of neutrality had its origin in the desire of the State to keep themselves away from a war between two or more other States and to escape the consequences of such a war. The history of the development of the institution of neutrality in International Law shows that the idea of self-preservation or self-defence permeated all those efforts made by the States throughout the centuries to establish a course of conduct enabling them to remain impartial in war. The attitude of neutrality adopted by a State during war between other States is not only beneficial to the neutral but also to the belligerents. The belligerents get a correct idea of the scope of warfare and have no fear of any action from the side of the neutrals likewise. The neutrals get a feeling of security that no harm will be done to them by the warring neighbours. The war becomes localised and finds no encouragement at the hands of neutral States. Neutrality helps in regularising the international relations. It will thus be seen that the law relating to neutrality is of utmost benefit to international society and that if the belligerents as well as neutrals observe the rules of International Law relating to neutrality immense benefit accrues

to both and neutrality finds itself fully justified. The growth and development of the institution of neutrality is due to the community of interest existing between the belligerents and non-belligerent. The mutual benefits to be gained by adopting a course of conduct prescribed by the rules relating to neutrality made it possible for States to subject themselves to various restrictions in time of war But the experience of the last two global wars shows that all that binds nations to each other breaks down under the stress of war. The Second World War saw the violation of the neutrality of Norway, Denmark, Holland and Belgium in a ruthless manner. Russia and the United States which had taken an attitude of neutrality in the beginning found it necessary to change their attitude and go to war to stop the German aggression. The neutrality of so many States though of a short duration instead of localising the war tempted the Germans to widen their sphere of aggression. Events took such a turn that an European war became a World conflict. It would appear that neutrality of Great Powers like Russia and the United States of America during the first two years of the war did not also discourage the aggressors. The first World War offerred no better experience. The United States of America in order to defend its neutrality had to join Great Britain and France in war. The idea of absolute impartiality was inconsistent with the principle on which the League of Nations was founded.

The ruthless violations suffered by neutrality during the two world wars were due to a number of causes for which both the neutrals and the belligerents were responsible. All illegal act of either belligerent instead of being protested against in a way permissible under the law, was tried to be met with by measures which were contemptions of law. A belligerent in response to wrongful acts of the enemy had recourse to a conduct contrary to normal obligations under the law. In the early stages of the war the Germans began sowing magnetic mines in British waters in violation of the Hague Convention of 1907 and the justification for this illegal act shown was that the British themselves were guilty of acts in violation of law. The allies as a measure of counter retaliation directed the capture of every exports in neutral vessels. It was thus a vicious circle, one illegality meeting another. The belligerents were more anxious for military advantages than for the discharge of obligations towards neutral States and they did not hesitate in violating neutral rights, if they could, by doing so, gain some advantage in warfare. The

neutral under States' apprehension of their own safety had no courage to repulse violations of their right and the belligerents had a free hand. The strength of the belligerents overarwed the neutral who naturally submitted to the violations. In such circumstances the neutrals could never discharge their obligations towards the belligerents.

The mere fact that the events of the two World Wars made it impossible for States to remain neutral is not enough to regard neutrality as having no justification as an institution of International Law and if under the heat and stress of war neutrality is either violated or ceases to serve its purpose the institution of neutrality can hardly be condemned.

It is possible to say that neutrality implying an attitude of impartiality may not be of great benefit to the neutral or the belligerent in an atomic age. An atomic war will hardly require a neutral State. The belligerency will also be very shortlived, as the warfare by nuclear weapons would mean destruction of the belligerents as well as the neutrals. Such a mechanised barbarism would destory the world with all its fine institution of law, literature and culture of which mankind is justly proud. But so long as States behave as rational beings and act on the principle of good neighbourliness incorporated into the Charter the utility of such an institution cannot be overstated. Even under the United Nations with its programme of collective security the war is a possibility and in such a war, the non-member States at least may be justified in adhering to the traditional neutrality.

CHAPTER LV

RIGHTS AND DUTIES OF NEUTRALS TOWARDS BELLIGERENTS

The status of neutrality involves rights and duties for the neutrals as well as for belligerents. The rights of the neutral States result in imposing corresponding duties on belligerents and the duties of neutral States are met by corresponding rights accruing to belligerents. *Starke* summarises the duties of neutral States as well as of belligerents thus:—

1. Oppenheim—International Law Vol. II. (Seventh Ed.). p. 672.

(1) Duties of abstention,
(2) Duties of prevention,
(3) Duties of acquiescence.

Oppenheim however observes that there are two rights and two duties deriving from neutrality for neutrals. According to him the two rights of neutrals are "(1) right to demand their attitude of impartiality." (2) "Right to demand that such behaviour from each belligerent as is inaccordance with their intercourse and in particular their commerce with the enemy shall not be suppressed." The two duties of neutrals according to him are (2) "the duty to act towards belligerents in accord ance with their attitude of impartiality." (2) "The duty to acquiesce in the exercise by either belligerent of the right to punish neutral merchantmen for breach or attempted breach of blockade carriage of contraband or rendering unneutral services to the enemy and accordingly to visit and search and eventually capture them."[1]

Lawrence in describing the duties of neutral states adds two more heads, *viz.*, the duties of restoration and duties of reparation. A close scrutiny of the various obligations which International Law imposes on neutrals and belligerents will show that the above classification is quite exhaustive. What these duties imply will appear from the following:—

1—(a) Duties of Abstention and the Neutrals.—The obligations of the neutrals falling under this group consists in refraining from doing any act which may assist either belligerent. A neutral must not either directly or indirectly give help to either belligerent, must not help either belligerent with troops or ships and must not in matters connected with war grant privileges to one of the belligerents. A neutral has to hold the balance even between contending powers. In the war between England and France in 1793 the action of the United States of America in granting certain privileges to France and withholding them from England was characterized as violating neutrality. The Treaty of 1778 between the United States of America and France provided that French ships of war and privateers would have the privilege of bringing their prizes or other merchandise into American ports but that nations at war with France were forbidden to sell their prizes or merchandise in

1. Oppenheim :—International Law. Vol. II (Seventh Ed.) p. 673.

American ports. America during the War of 1793 acted in accordance with this term of the Treaty and England lodged successive protests. The negotiations for release could only succeed when the Convention of 1800 by which this provision was dropped was signed. The neutral State must abstain from treating the belligerent unequally. If a neutral State grants facilities in matters unconnected with military or naval operations to one, it is bound to grant the same facilities to the other belligerent. A neutral has to abstain from giving or lending money, giving or selling instruments and munitions of war to either belligerent. It cannot also guarantee loans. It must abstain from providing shelter to armed forces of the belligerents. It must disallow across its territory movement of troops or convoys either of munitions of war or of supplies. But it may allow within its territory passage to wounded soldiers of either belligerent. It may also not forbid the passage of belligerents men-of-war through its maritime belt. The case of *Altmark* illustrates this rule. The *Altmark* was a German auxiliary vessel which was carrying three hundred British officers and sailors picked from several vessels sent by German armoured ship, the *Admiral Graf Spee.* On her way to Germany it entered into Norwegian territorial waters and permission was given to her to navigate in these waters. The Norwegian authorities, when asked by the British naval force to see that Altmark was carrying British prisoner refused. While Altmark was thus staying a British destroyer entered those waters and released the prisoners and brought them to England. Norway lodged a protest against the act of violation of neutrality.

(*b*). **Duties of abstention and the Belligerents.** The belligerents are likewise bound by duties of abstention. They have to abstain from doing acts which amount to violation of neutrality. They must abstain from making direct preparations for war on neutral territory. Reinforcing or recruiting troops, on neutral territory is nothing but direct preparation for war and is therefore prohibited. A belligerent must not make the neutral territory a base for warlike operations This duty of abstention also requires the belligerents. not to enter into hostilities in neutral waters or the

air space above the neutral territory. It has a duty to abstain from interfering with the legitimate intercourse of the neutrals with the enemy. Belligerent ships must not stay for rest or refitting in neutral posts.

A belligerent must not occupy any neutral territory in furtherance of its war efforts. It has to abstain from getting prize courts on neutral land. Convention XIII allows a prize to be brought into a neutral port on account of unseaworthiness, stress of weather or want of fuel 'or provision on condition that it must leave as soon as the circumstances which justified its entry are at an end. This rule was applied in the case of the *Appam* during the First World War. The *Appam*, a British liner was captured by German war vessel off the coast of Africa and was navigated by a prize crew to the American neutral port of Newport News. The American Government released the ships' crew and passengers and interned the prize crew. The owners of the vessel took up proceedings in American courts. It was held that inasmuch as the vessel was brought to American port for reasons other than unseaworthiness stress of weather or want of fuel or provision, it was entitled to be set free.

A belligerent must not also build and fit out its vessels in neutral ground for the purpose of its naval operations. The neutral territory cannot be used by belligerent for any purpose which may be connected with hostilities and the duties of abstention require the belligerents to refrain from using the neutral territory for such a purpose.

2 (*a*). Duties of prevention and the Neutral.—These duties consist in preventing within neutral territory all such acts as may be intended to assist a belligerent. A neutral State must prevent a belligerent from committing acts of hostilities on its territory. It is legitimate for a neutral to repulse belligerent men-of-war which attack an enemy vessel in its waters and to forcibly prevent the belligerent forces from making their way through its territory. The duties of prevention require the neutral State to recall his military and naval officers who were serving with either belligerent before the outbreak of war and to prevent its military and naval officer from resigning their commissions for the purpose of serving either belligerent. The neutral State must prevent establishment of prize courts on its territory. It has to prevent either belligerent from making its territory or port as a base of naval operations. It must prevent belligerent men-of-war cruising in its maritime belt from capturing enemy vessels. A belligerent

vessel cannot be allowed to replenish itself with munitions and armaments in neutral waters.

A neutral State has to prevent commission of acts which may amount to violation of neutrality. Violations of neutrality must be repulsed by the neutral. If the neutral State does not repulse the attack on its neutrality it has to make reparation. The duties of prevention require the neutral State to prevent the commission of all those acts which if permitted would amount to participation in war and would be injurious to one of the belligerents. It may however be noted that this duty of prevention extends only to the acts which can be controlled by the neutral, for the failure on the part of the neutral to prevent, the commission of those acts which it can legitimately control constitutes participation in war and violation of neutrality. Acts which are intended to be committed within the territorial jurisdiction of a neutral State are generally under its control and the neutral has power to prevent the commission of such acts.

It is not only the duty but a right of the neutral State to prevent either belligerent or its agents from committing acts which have the effect of violating the territorial sovereignity of the neutral State. A neutral State is perfectly justified in preventing all attempts to commission hire, retain or induce, on its soil, persons of whatever nationality, to enter into belligerent service. Similarly, it has a right to prevent all belligerent attempts to induce persons to go out side the neutral territory with the object of enlisting them into beiligerent service. A neutral State has a right to prevent departure from its territory of persons who had been enlisted in the service of the belligerent on its soil. The duty of prevention has a very wide scope and all acts which have an effect of benefitting one of the belligerents and of injuring the other must be prevented.

A neutral is bound to prevent commission of acts both on its land and its waters. The neutral waters can not be used for the purpose of fitting out and arming vessels adopted for hostile uses. The duty of prevention in relation to neutral waters has clearly been defined in Art. VI of the Treaty of Washington with Great Britain of May 8, 1871. Article VI embodies the rules of International Law about the duty of prevention and lays down that a neutral State is bound :

Firstly, to use due diligence to prevent the fitting out, arming or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on

war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use ;

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men ;

Thirdly, to exercise due diligence in its own ports or waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

It is however of importance to note that the duty of prevention does not extend to commercial acts of neutral subject. A neutral is therefore not bound to prevent export or transit, for one or the other of the belligerents, of arms, munitions of war, or in general of anything which can be of use to any army or fleet.

(b)—**Duties of prevention and the Belligerents.**—A belligerent State owes this duty to a neutral State. It is bound to prevent ill-treatment of neutral envoys and neutral subjects. A belligerent is also required to prevent injury to neutral property on enemy territory occupied by it. The duty of prevention on the part of the belligerents extends to all those acts which a neutral has a right to prevent. A belligerent is in duty bound to respect the neutrality of a State and it cannot therefore suffer the commission of an act which amounts to violation of neutrality. It has to see that its agents do not indulge in such acts on neutral territory as may keep it in war and may be correctly interpreted to be hostile acts of the neutral State.

The duty of prevention on the part of a belligerent implies a duty to respect the sovereignty of the neutral and renders it obligatory on the belligerent to prevent commission of acts of hostility within neutral territory. A belligerent has to prevent the movement of its troops or convoys of either munitition of war or supplies across neutral territory. Likewise it is bound to prevent erection on neutral territory of a wireless telegraphy station or other apparatus for the purpose of establishing communication with its forces on land or sea. A belligerent is required to prevent capture of enemy vessels in neutral waters.

3*(a)*. Duties of acquiescence and the Neutral. A neutral State has a duty to acquiesce in such acts on the part of the belligerents which are permitted by rules of International

Law. The modern right of angary, though not deducible from the law of neutrality, requires a neutral to acquiesce in the act of belligerents of using or destroying neutral property on their territory in case of necessity for the purpose of offence or defence. International Law recognises the belligerent's right of angary and the neutral State cannot but acquiesce in the exercise of such right.

The principle of freedom of commerce is also recognised by International Law and a neutral subject is free to establish commercial relations with either belligerent. A neutral State is under no duty to prevent its nationals from selling articles of all kinds to belligerents. It is permissible for neutral merchant-men to carry articles sold by neutral subjects by open sea to the belligerent purchaser. But International Law concedes to belligerents a right to prohibit and permit the carriage of contraband by neutral merchantmen. A neutral State must acquiesce in the act of capture of its merchantmen carrying contraband. It must accept the verdict of the prize courts before which its merchantmen may have to be brought. By theory and practice it is recognised that a belligerent is entitled to seize on open sea and in its maritime territorial belt neutral vessels carrying contraband and to take up proceedings against such vessel before the national prize courts. The belligerents also possess a right to visit and search neutral vessels for the purpose of ascertaining whether they really belong to neutral State and whether they are out to attempt breach of blockade or to carry contraband. The neutral State must acquiesce in all these acts of the belligerents, which are perfectly lawful in time of war.

A neutral State has to acquiesce in incidental damages suffered during legitimate war like operations. It is not unusual that neutral property is destroyed during a battle and the neutral State cannot but endure it quietly. It may however be noted that the duty of acquiescence extends only to such acts as are done lawfully, that is to say, as have been permitted by International Law.

(*b*). **Duties of acquiescence and the Belligerents.**— The belligerents are duty-bound to acquiesce in all those acts of the neutral State which are permissible under the rules of International Law. There are numerous matters in which a neutral State can act in exercise of its discretion without losing its neutrality and it is in these acts that a belligerent has to acquiesce. It is not unusual during a war that land and naval forces of the belligerents enter into neutral territory

and it is not obligatory on the neutral State to grant them asylum. The neutral State may grant asylum to land and naval forces of the belligerent or may refuse it. A belligerent has no right to demand asylum from the neutral State. It can not also object to asylum being given to the enemy. It has to acquiesce in the grant of asylum to the enemy. It has also to acquiesce in the detention of its troops who have escaped into neutral territory. A neutral State has the right to detain prisoners of war who have either escaped into its territory from the place of their detention or who have been brought on its soil by enemy troops. No objection can be taken to this detention.

War materials coming into neutral territory can be legitimately seized and retained by the neutral State. This act, too, has to be acquiesced in by the belligerents. A neutral State can grant temporary asylum to belligerent men-of-war and can also after granting asylum disarm and detain it in neutral port. These and similar acts are permitted by International Law and the belligerents are under a duty of acquiescence with respect to them. This duty of acquiescence imposed on the neutral as well as on the belligerent keeps them in their right places in the maintenance of the Status of neutrality or impartiality.

4 (a). **Duties of Restoration and the Neutrals.**—The duty of restoration imposed on a neutral State arises either when there is violation of neutrality or when the war comes to a close. The violation may be committed either by a belligerent against a neutral or by a neutral against the belligerent. In either case of the violation of neutrality the neutral may be held duty bound to make restoration. If a belligerent unlawfully captures prize in neutral waters, the neutral states within whose waters the capture was made is bound to make all efforts to obtain the return of the prize and to restore it to the power from whose custody it was snatched. It is in exercise of this duty that a neutral State is obliged to initiate proceedings claiming the return of the prize, on the ground of unlawful capture by a belligerent. A neutral State may, in order to perform its duty of restoration, resort to diplomatic requests instead of appealing to the prize court of the captor. The State to which the captured ship belonged cannot initiate proceedings for its recovery if the seizure cômplained of took place in neutral waters. In the case of the *Eliza Ann* (1813)[1] it was held that it was the privilege not of the enemy but of the neutral State

1. Dods. 244.

whose tranquility was disturbed to demand reparation for the injury sustained by it. The neutral State therefore owes a duty to the belligerent whose vessel was illegally seized in neutral waters by the enemy to initiate proceedings for restoration or reparation.

The duty of restoration also arises when a belligerent brings a prize into a neutral port for reasons not admissible under the rules of International Law. The Hague Convention XIII allows that a prize may only be brought into a neutral port on account of unseaworthiness, stress of weather or want of fuel or provisions. The prize so brought must leave as soon as the circumstances which justified its entry are at an end. If the prize does not leave when asked to do so, the neutral State is entitled to use force at its disposal to release the vessel and to intern the prize crew. The release of the vessel is affected in order to restore it to the owner. Similarly, when a prize is brought in a neutral port for causes other than unseaworthiness, stress of weather or want of fuel or provisions, the neutral is justified in affecting the release of the prize and in interning the prize crew. All this is done to restore the vessel to the belligerent owner. The case of the *Appam* stated above fully illustrates the exercise of the duty of restoration in respect of the prize brought into a neutral port during the First World War.

The duty of restoration arises also when the war comes to an end. The neutral State is bound to restore to its owner war materials to which it granted asylum during war. War material belonging to one of the belligerents brought into neutral territory by the enemy is also to be restored to the owner. A neutral State which receives in its territory troops belonging to the belligerent armies may intern them till the close of war. It has a duty to send them to their country on the close of war and it has also a right to claim the expenses which it incurred over their maintenance. The duty of restoration at the close of the war may arise in other similar cases also.

(b). **Duties of restoration and the Belligerents.**— A belligerent acting in violation of neutrality or in exercise of its right of angary owes this duty to the neutral. Violations of neutrality are committed in more ways than one and the duty of restoration arises when the wrong to the neutral State can be remedied by restoration of the property in respect of which the wrong was done. For example, the belligerent who illegally seizes a vessel belonging to the enemy in neutral waters is bound to restore the vessel.

In exercise of right of angary a belligerent can make use of or destroy in case of necessity neutral property on its territory, on enemy territory or on the open sea. The neutral State is duty bound to acquiesce in such acts but the belligerent acting in exercise of such right has a duty to restore, if restoration is possible. Neutral vessels made use of by a belligerent in necessity must be restored. Since all sorts of neutral property is capable of being seized by the belligerents in exercise of the right of angary, the duty of restoration extends only to those which are capable of being restored. The properties destroyed in exercise of the right of angary cannot however be restored and in such a case it is the duty of the belligerent to compensate the neutral for the loss.

5. **Duties of Reparation on Neutrals and Belligerents.**—The duties of restoration and reparation are complimentary to each other and serve to undo the wrong against neutrality. This duty of reparation is imposed upon both the neutral and the belligerents. It is the wronged party who is entitled to reparation at the hands of the wrong-doer. If a neutral State is guilty of violating its neutrality it has to make proper reparations· What reparation the wrong doer is to make depends upon the nature of the violation committed. The reparation need not always be in terms of money. Generally the form that a reparation is to take is decided between the parties on negotiations held for that purpose. Sometimes a word of apology is an adequate compensation. International Law simply imposes the duty of reparation on the wrong doer and does not lay down rules as to how this obligation is to discharged. The reparation which the wrong doer is to make must be adequate in the circumstance of a particular wrong.

The duty of reparation which a neutral State owes to a belligerent arises when there is a failure on the part of the neutral State to perform the obligations flowing from its status of neutrality. The failure on the part of the neutral State to fulfil its obligations may be either wilful or negligent. In either case the neutral State must make reparations to the wronged belligerent. A neutral State is bound to make reparations for acts which if it had exercised with due diligence it could have prevented and which it by culpable negligence failed to prevent. Apart from deliberate violations, a neutral State is hardly responsible if it exercised due diligence in preventing the acts complained of.

A neutral State becomes guilty of violations in a number of

ways and it renders itself liable to make reparations to the wronged party. If it fails in any of the duties of abstention prevention or acquiescence it must make proper amends. Its liability also arises if it acquiesces in violations of neutrality committed by one belligerent resulting in injury to the other. A neutral State cannot sit quietly when a prize is captured in neutral waters. It has to ask for reparations from the wrong doer and also for the release of the prize. If it acquiesces, it must itself make reparation to the belligerent owner.

The belligerents also owe a duty of reparation to the neutral State in respect of the wrong done by it. The belligerent who by his wrongful act injures the neutral must be prepared to undo the wrong, punish the perpetrators and afford such satisfaction as is just and proper. Diplomatic negotiations bring about a settlement as to what form of reparation would be acceptable to the wronged party. When restoration of the property in respect of which the wrong was done is not possible, other methods of satisfying the injured feelings of the neutral State are adopted. During the American Civil War an interesting case of reparation arose. The *Florida* which was a Confederate cruiser was seized by the Federal Steamer *Wachusett* in the neutral port of Brazil. It was thereafter taken to the United States as a prize. Diplomatic negotiations ended in favour of the neutral State of Brazil. The Commander of the steamer, *Wachusett* was tried by court-martial, the United States Consul who had advised the attack was dismissed, the flag of the neutral was given a salute at the place where the cruiser was captured and the crew was set free. The *Florida* which had been sunk could however not be restored to Brazil.

The duty of reparation also arises when a belligerent had in exercise of its right of angary made use of or destroyed neutral property found in its territory, the enemy territory or on the open sea. The right of angary implies that the belligerent exercising the right has to make proper reparations. Belligerents are to depend upon their own resources or on what they can snatch or capture from the enemy. They cannot use or destory neutral property and if they do so, they must be prepared to compensate the neutral State. The duty of reparation has been confered on the belligerents to keep them within their legitimate bounds and not encroach upon the neutral terrtiory and to prevent them from injuring the neutral in any way.

When belligerents requisition neutral property in case of

necessity, they are duty-bound to make adequate reparations to indemnify the neutral owner of the loss of property appropriated or destroyed.

Consequences of Neutral Rights and Duties.—The consequences that flow from the duties of the neutrals enumerated above and the corresponding rights may be stated as thus:—

1. A neutral State cannot render any assistance to either belligerent. It cannot render aid to one of the belligerents to the detriment of the other.

2. A neutral State has to take active measures for preventing belligerents from making use of neutral territories and neutral resources for the purpose of war and from interfering with its legitimate intercourse with either of them.

3. A neutral State has to abstain from granting passage over its territories to belligerent forces and from cooperating directly or indirectly with either belligerent.

4. A neutral State is not precluded from giving such facilities not directly concerning military or naval operation to belligerents as are consistent with its attitude of impartiality. But such facilities should be given to both the belligerents alike.

5. A neutral State is under a duty to abstain from committing acts of hostility against either belligerent. But it is within its right to repulse by force any violation of its neutrality.

The Hague Convention V respecting the rights and duties of neutral powers and persons in war on land lays down that "the fact of neutral power repelling even by force attacks on its neutrality cannot be considered as a hostile act."

6. According to Hague Convention V a neutral State is forbidden to supply in any manner either directly or indirectly to belligerents warships, ammunition or war material of any kind whatsoever.

7. It is the duty of a neutral State to call its military or naval officer who may be serving in the army or the navy of either belligerent before the outbreak of war and not to allow its military or naval officers to go

for service to either belligerent. This duty however does not preclude a neutral from allowing its surgeons and other non-combatant members of its army to enlist or remain in the service of either belligerent.[1]

8. The Hague Convention V enacts that 'a neutral power is not bound to prevent the export or transit for one or the other of belligerents, arms, munitions of war or in general of anything which can be of use to an army or fleet.'

9. A neutral State is not forbidden to grant passage over its territory of the wounded or sick. The neutral State which allows the wounded or sick of a belligerent to enter its territory is however bound to keep watch over those wounded and sick and to prevent them from returning to their armies after recovery.

10. A neutral State has a right to allow passage to belligerent men-of-war through its maritime belt. The Hague Convention XIII lays down that the neutrality of a power is not violated by the mere passage of belligerent men-of-war and their prizes.

11. A neutral State is under no obligation to grant passage to belligerent men of war through its river.

12. A neutral State may permit passage of belligerent men of war through its neutral straits which connect two open seas. But it has a right to deny passage through its artificial straits which are not subject to international regulation.

13 A neutral State is under no obligation to refuse passage to vessels carrying contraband to one of the belligerents through international water-ways under her control and supervision.

This rule is based on the law laid down in *S. S. Wimbledon*. *Wimbledon*, a British vessel chartered by a French company was carrying military materials to Poland which was then at war with Russia. It was refused passage through Kiel Canal by Germany. The complaint made by the Allied Powers was to the effect that Germany had broken the Treaty of Versailles (1919) and it was liable in damages. Reliance was placed on Art. 380 of the Treaty relevant portion of which ran thus:—

1. Oppenheim—International Law, Vol. II (Seventh Ed.) p. 687.

"The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany of terms of entire equality..........."

It was contended that Wimbledon belonged to a nation which was friendly with Germany at that time and that it was entitled to pass through the Canal. On behalf of Germany it was urged that the right of free passage through the canal was in the nature of a servitude dependent upon the will of Germany and this servitude could not be allowed to affect her rights as a neutral. It was also pleaded that grant of passage through the Canal could not place Germany under obligation to allow the passage through the Canal of contraband designed for one of the belligerents. The Permanent Court of International Justice held that permission by Germany of passage to Wimbledon would not have imperilled her neurality and that Germany not only did not in consequence of her neutrality incur the obligation to prohibit the passage of Wimbledon through the Kiel Canal but on the contrary was entitled to permit it.

14. A neutral State is under a duty to prevent establishment of Prize Courts on neutral territory.

15. A neutral State is forbidden to permit the safe custody or sale of prizes within its territory. It may however allow the prizes to be brought to its port on account of unseaworthiness, stress of weather or want of fuel or provisions but it must compel them to leave its ports as soon as circumstances which justified their entry are at an end. In this connection the case of *Appam* be noted. During the First World War the Germans captured the British liner *Appam*. This British liner was thereafter taken by a prize crew to the American neutral port of Newport News. The American Government liberated the ship's crew and passengers but interned the prize crew. The owners of vessel took up proceedings in American Courts for the release of the vessel. The Court held that *Appam* which had not been brought to American port on account of any unseaworthiness, stress of weather or want of fuel or provisions must be set free.[1]

16. A neutral State need not forbid its nationals to

1. (1917) 243 U. S. 124.

supply arms and other commodities of war to either belligerent in the course of their ordinary trade.

17. A neutral State must not allow erection of factories for arms and ammunitions and must not permit the formation of corps of combatants or the opening of recruitment offices on its territories.

18. A neutral State is under no duty to refuse passage to individuals or group of individuals intending to enlist in the army or navy of the belligerents. But it must prevent the organization of a hostile expedition from its territory against either belligerent.

19. A neutral State must not allow belligerent men-of-war to replenish their arms or ammunitions while in neutral port or maritime belt and to make such repairs as are not absolutely necessary to make them seaworthy. During the First World War the German cruisers Prinz Eithel and Gier entered the American neutral port. They were allowed to complete their repairs within a certain time. As they exceeded the time limit and did not leave neutral port they were interned and dismantled until the end of war.

20. A neutral State must not allow belligerents to make its ports and territorial waters the basis of naval operations or preparations. It must therefore not allow belligerent men of war shelter for a long time and must at the outbreak of war ask belligerent men-of-war which may happen to be in its ports or waters to leave within twenty four hours.

21. A neutral State is however under no duty to prevent its nationals from selling armed vessels to either belligerents but it must prevent its nationals to build and fit out armed vessels to the order of a belligerent, for the purposes of naval operations. The case of *Alabama* is in point and may be noted. During the American Civil War Great Britain built *Alabama* to the order of the insurgents. The vessel left Liverpool unarmed but after sailing for a distance it met three other English vessels which supplied *Alabama* with guns and ammunition and made it fit for naval operations. The United States claimed damages from Great Britain for the losses

caused by operations carried on by *Alabama*. By agreement the matter was referred to arbitration and the award that followed ordered Great Britain to pay heavy damages to the United States.

22. A neutral State may allow within its territory asylum to prisoners of war of either belligerent. As soon as prisoners of war come to a neutral territory they become free. The Hague Convention V however requires that in case the prisoners of war are allowed to stay in a neutral territory the neutral State may prevent them from rejoining their forces.

23. It is within the discretion of the neutral State to allow soldiers of belligerents asylum within its territory. Similarly it allows war materials of the belligerents to be brought into its territory and if does so allow he must seize the war materials and retatain it until the conclusion of the war.

24. A neutral State must intern belligerent aircraft which has come to its land either intentionally or inadvertently.

25. A neutral State has the right to disarm and intern belligerents who enter its territory while carrying arms.

This rule is based upon the decision in the *Naulilaa* Incident[1].

26. A neutral State may not allow asylum to either belligerent men-of-war in its ports and territorial waters. But if it allows asylum to men-of-war of one belligerent it must allow it to men-of-war of the other belligerent also.

27. A neutral State must not advance loan or grant subsidies to either belligerent. But it is under no duty to prevent its subjects to raise subscriptions for loans or to grant subsidies to belligerents on its territory. It is, however, not permitted to allow public appeals to be made on its territories for subsidies to the belligerents.

28. A neutral State must prevent its men-of-war or other public vessels from rendering transport services to belligerents. But its under no obligation to prevent its merchantmen either from carrying

1. (1928) 2 Reports of International Arbitral Awards.

contraband or from rendering transport services to the belligerent in the way of trade. The neutral merchantmen in rendering such services are under a risk of being captured and punished.

29. According to Hague Convention V a neutral power is not bound to forbid or restrict the employment on behalf of belligerents of telegraph or telephone cables or of wireless telegraph apparatus whether belonging to it or to companies or to private individuals.

30. A neutral State is under an obligation not to acquiesce in the violation of its neutrality by one belligerent to the detriment of the other belligerent.

Rights and Duties of the Belligerents towards Neutrals.—According to *Oppenheim* there are two duties and two rights of belligerents arising out of the status of neutrality adopted by a third State. The two rights are (1) the right to demand impartiality from neutrals (2) right to punish subjects of neutrals for breach of blockade, carriage of contraband and unneutral service and accordingly to visit, search and capture neutral merchant-men. The two duties are:—(1) Duty to act towards neutrals in accordance with their attitude of impartiality (2) Duty not to suppress neutral intercourse and in particular their commerce with the enemy[1]. The chief consequences that arise from these rights and duties are:—

1. The belligerents are under a duty not to violate neutral territory for purposes of war.

No part of the neutral territory can be permitted to be used for purposes of war. This rule was followed in the case of The Twee Gebroeders[2] The Twee Gebroeders which was a Dutch vessel on a voyage from Emden to Amsterdam which was then under a blockade was captured by boats sent from the L Espeigle which was lying in Eastern Eems. The Prussian Government lodged a claim on the ground that in as much as the L Espeigle was lying in neutral waters the capture was to be deemed to have taken place within the Prussian neutral territory. It was held that the L Espeigle was lying within the limits to which neutral immunity is usually conceded. *Sir William Scott* laying down the rule observed: "I am of opinion that 'no use of a neutral territory for purposes of war is to be permitted. I donot say

1. Oppenheim—International Law Vol. II (Seventh Ed.) p. 673, 674.
2. (1800) 3 C. Role 163.

remoter uses, such as procuring provisions and refreshments and acts of that nature, which the law of nations universally tolerates; but that no proximate acts of war are in any maner to be allowed to originate on neutral grounds; and I cannot but think that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted,...An act of hostility is not to take its commencement on neutral ground. It is not sufficient to say if it is not completed there-you are not to take any measure there that shall lead to immediate violence; you are not to avail yourself of a station on neutral territory, making as it were a vantage ground of the neutral country, a country which is to carry itself with perfect equality between belligerents, giving neither the one nor the other any advantage.................I am of opinion that this capture cannot be maintained."

2. The belligerents are under an obligation not to interfere with the legitimate intercourse of neutral with the enemy. A belligerent therefore cannot by any means suppress or stop commerce or trade of the subjects of the neutral State witn the enemy. It cannot also, as laid down by the Hague Convention XI, violate postal correspondence of neutrals except correspondence destined to or proceeding from a blockaded port.

3. Either belligertnt is not permitted to appropriate neutral goods or enemy vessels or enemy goods or neutral vessels. The Declaration of Paris of 1856 enacted that neutral flag covers enemy goods except contraband of war and that neutral goods with the exception of contraband goods were not liable to be appropriated by the belligerents.

4. The belligerents on their occupation of enemy territory are under an obligation not to molest diplomatic envoys accredited to the enemy and to allow them to leave the country.

5. According to Hague Convention V belligerents are ferbidden to move across the territory of a netural power troops or convoys either of munitions of war or of supplies.

6. Belligerents are forbidden to use neutral ports or waters as a base of naval operations against their

adversaries. The case of *Atmark* may be noted in this connection. The *Altmark* a German auxiliary warship having on board three hundred British officers and sailors belonging to various British vessels which had been sunk by German armoured ship, *Admiral Graf Spee* entered Norwegian territorial water with permission. While the *Altmark* was thus in Norwegian waters the British naval Commander asked permission to search the *Altmark*. Norway refused the request and the British destroyer the *Cossack* entered the waters where the *Altmark* had taken shelter and released the British prisoners from board the *Altmark* and carried them away to England. Norway protested on the ground that Great Britain violated her neutrality.

A belligerent may not complain in respect of violation of neutrality committed by a neutral State in favour of the other belligerent and it may acquiesce in such violation of neutrality. But the neutral State has no right to aquiesce in any violation of neutrality which has been committed by one belligerent to the detriment of the other. A neutral has thus a right to repulse violation of its neutrality. If it fails in repulsing such violations it is under an obligation to claim reparations of the wrong done from the party guilty of violation of neutrality.

7. Belligerents have no right to demand from neutral States asylum for their subjects, their property and their land or naval forces.
8. Belligerent military aircrafts are forbidden to enter the air space over neutral territory.
9. Belligerent men-of-war which have been allowed asylum in neutral ports or neutral waters are forbidden to abuse asylum so granted. The belligerent men-of-war cannot stay for a longer period than is necessary under the circumstances.

CHAPTER LV

VIOLATION OF NEUTRALITY

Violation of neutrality-Defined.—International law imposes certain duties and confers certain rights both upon the neutrals and the belligerants. The duties deriving from neutrality lay down a course of conduct both for the neutral and the belligerents. Any deviation on the part of either the neutral or the belligerents from this course of conduct results in violation of neutrality. Any dereliction of duty on the part of either belligerents or

neutral would amount to violation of neutrality. Any act or omission on the part of the neutral or the belligerents contrary to the duties deriving from neutrality constitutes violation of neutrality. Both the neutral and and the belligerents can be guilty of violating neutrality.

A belligerent owes certain duties to the neutral and if it fails in these duties it violates neutrality and thereby causes injury to the neutral State. A belligerent may also during the course of the war in which it is engaged may cause loss or injury to the neutral by acting contrary to laws of war. In such a case the injury is not due to any violation of neutrality but due to something done contrary to laws of war. It is therefore important to note the the distinction between violation of neutrality and violation of laws of war. The act complained of must be scrutinized and if it appearsthat it isnotin accordance with the duties imposed upon belligerent by the rules of International Law governing the relation between the belligerents and the neutral, it is a clear case of violation of neutrality. If on the other hand the act of the belligerent causing injury to the neutral is not contrary to its duty arising under the condition of neutrality there is no violation of neutrality.

Violation of neutrality may be either deliberate or negligent. A violation of neutrality deliberately committed may lead to acts of hostilities on the part of the injured party.

Effect of violation on neutrality.— The status of neutrality endures till the war is over unless it is terminated earlier by a declaration of war. The acts of the neutral or the belligerents in violation of neutrality can not themselves put an end to neutrality. The status of neutrality continues even if the neutrality has been violated and the obligations arising from neutrality have not been discharged. A violation of the rights and duties of the neutral State or of the belligerents do not absolveeither the neutral or the belligerents from their liability to act in accordance with their duties deriving from the condition of neutrality. An act of the neutral State contrary to its duties as a neutral cannot by itself be expressive of an intention of giving up or ending its neutrality.

The violation of neutrality may serve as a cause for the commencement, of hostilities between the neutral and either of the belligerants but can not itself mark the end of neutrality. A violation of neutrality may ligitimately be repulsed and may result in a demand for reparation from the State committing the violation. A violation of neutrality either by a belligerant against the neutral or by a neutral against a belligerent will

give rise to duties of restoration and reparation on the part of the state committing the violation. The injured State will in the case of a grave violation be justified in declaring war against the wrong doer and in commencing hostilities against it. Such a course of conduct will mean end of neutrality.

The attitude of impartiality will not allow the neutral to acquiesce in the violation of neutrality committed by one of the belligerents and to repulse that committed by the other belligerent. The neutral must repulse all violations against its neutrality and must protest against them. But a belligerent may condone a violation of neutrality committed by a neutral against the other belligerent and may repulse that directed against it. The neutral State has a duty to repulse all violations of neutrality whether directed against one or the other belligerent by employing all the means at its disposal. It has also a duty to protest and to make demand for reparations from the party committing the wrong.

The duty of impartiality requires a neutral State to employ all means at its disposal to prevent the violation of neutrality by a belligerent. It can not sit quiet for any inaction on its part is likely to be taken as assistance to one belligerent to the detriment of other. Article 3 of Hague Convention XIII requires the neutral power to employ the means at its disposal to release the prize with its officers and crew and to intern the prize crew, when a ship is captured in its neutral waters. The neutral State must repulse the act of violation of its neutrality. If it cannot prevent the violation, it must claim reparation from the offender. In case the netural State does not prevent violation by means at its disposal or does not claim reparation from the offender, it is itself guilty of violation of neutrality and is liable to the injured belligerent for the loss sustained by it. The neutral State is absolved from all liability if on an attack on enemy forces within neutral territory by a belligerent, the enemy forces instead of relying upon neutral protection defend themselves. The case of *Geeral Armstrong* supports this view. *General Armstrong* which was an American privateer was during war in 1814 between Great Britain and United States of America, was lying in the harbour of Fayal belonging to the Portuguese. *General Armstrong* when attacked by an English squadron defended itself but was captured. America claimed damages from Portugal. The matter was referred to Napolean for arbitration. In 1852 Nepolian gave an award in favour of Portugal. It was held that in as much the American vessel *General Armstrong* did

not rely upon Portugal for protection but defended itself against the English attack Portugal could not be made responsible for the loss.

Violation of neutrality before the First World War.— History records numerous instances of violations of neutrality under the stress of wars. A classic dispute regarding violation of neutrality is furnished by the *Alabama* case. The question was whether Great Britain was guilty of violating neutrality by permitting her territory to be used as basis of hostile operations during the American Civil War. Several ships for the Confederate Navy were built in British ship-yards and were fitted with guns and munitions outside British territorial waters. The question that arose was whether Great Britain acted with due diligence. The case was decided in favour of the United States and it was held that a neutral State was to exercise due diligence in its own ports and waters and as to all persons within its jurisdiction to prevent any violation of neutrality. The Arbitral Tribunal deciding the case laid down that due diligence ought to be exercised by neutral State in exact proportion to the risk to which either of the belligerents may be exposed. The responsibility of exercising of due diligence laid down by this case was replaced by a duty of neutral State to employ the means at its disposal by the provisions of the Hague Convention XIII of 1907.

The Russo-Japanese war of 1904-1905 gives a case of violation of neutrality. A Russian torpedo boat Reshitelni escaped from port Arthur which had been besieged by Japan. The torpedo boat evaded the pursuit of the Japanese destroyers and reached the neutral Chinese harbour of Chefoo. The Japanese destroyers waited outside for the Russian boat to leave the neutral harbour. The Chinese and Russian authorities reached an agreement to the effect that the vessel should be disarmed and interned. In pursuance of this agreement the vessel was to some etxent disarmed. Thereafter the Japanese boarded the vessel and asked the commander either to surrender or to put to sea in an hour. The commander refused and the Japanese carried off the boat. The Japanese were undoubtedly guilty of violating the neutrality of China. This case supports the rule that a belligerent vessel if attacked in neutral waters has a right to defend itself, if not defended by the neutral power at the appeal of the attacked vessel.

Violation of neutrality during First World War.—The beginning of the First World War is marked by the violation of

the neutrality of Belgium and of Luxemburg which enjoyed permanent neutral status. Germany pleaded justification on the ground of self-defence. It was urged on its behalf that as it apprehended an attack by France from that direction, it was was necessary to invade these territories. Great Britain refused to accept the plea of justification and declared war on the ground of violation of neutrality by the Germans.

Another important case of violation of neutrality that arose in 1915 is that of *Dresden*, a German cruiser which having escaped from the British fleet took refuge in a neutral Chilean port. The Chilean authorities asked the *Dresden* to quit within 24 hours on pain of internment. The commander of the Dresden refused to quit and he was informed by Chilean authorities that the vessel stood interned. Meanwhile two British cruisers entered the Chilean port and opened fire on the Dresden which informed the attackers that she was in neutral waters. The British cruisers did not cease to fire and asked the captain of the Dresden to surrender if he wanted to avoid destruction. The captain of the Dresden instead of surrendering himself ordered the crew to blow her up and sink her. The Chilean Government put up a complaint against the British Government for violation of her neutrality by the British cruisers. The British Government offered a full and ample apology, though it maintained that the Dresden itself violated the neutrality of Chile.

There were other violations of neutrality in 1916 when several German and Austro-Hungarian merchant-ships were captured by Allied warships in Greek waters. The capture was sought to be justified on the ground that the Greek territorial waters, had become a theatre of war. In the same year the British steamer *Adams* was captured by a Geaman tarpedo boat in Swedish territorial waters and was taken to a German port. Sweden protested and Germany apologised and brought the vessel back to the spot where it was illegally captured. In 1917 the British cruisers captured German vessels, *Pellworm* and others in Dutch territorial water. The Dutch Government laid a claim in respect of those vessels in British Prize Court.

These are only a few out of innumerable instances where during this war, acts in violation of the law relating to neutrality were deliberately committed. Such was the disregard of the law that President Wilson on October 16, 1916 was constrained to observe that the business of neutrality was

over. The entire history of the war discloses a sad picture of lawlessness.

Violation of neutrality during the Second World War.—As stated elsewhere the traditional view of neutrality found favour with the nations when war broke out in 1939. Many States such as Norway, Denmark, Holland, Belgium, Luxemburg and the United States proclaimed their neutrality. President Roosevelt urged upon the adoption of the traditional neutrality But the stress of war from its commencement was such as did not allow traditional neutrality to be effective in controlling the actions of the belligerents or the neutrals. So fast were the operations of war that nations which stood aloof became apprehensive of their own safety and naturally became sympathetic to one or the other belligerent. Germany in its bid for world domination always found justification for its deliberate contravention of the rules of International Law. The events happening in the early stages of the war showed no respect for neutrality and the result wasthat the law relating to neutrality reached its vanishing point.

In October 1939 when the United States of America was still neutral the American S·S· City of Flint destined for British ports was captured on the open sea by a German cruiser and was taken to Tromso, a Norwegian port. It stayed there for a few hours after which it was asked to leave by the Norwegian Government. The vessel was then taken to the Russian harbour of Murmausk where it stayed for a few days. In the meantime the American Charges'd affairs at Berlin was nagotiating with the German Government about the release of the vessel. The Russian asked the vessel to depart in the control of the German prize crew. The City of Flint during its journey came again to Norwegian territorial waters where it was accompanied by a Norwegian naval ship. As the American vessel had an ailing person on board permission was sought to anchor at Norwegian port, Hangesund. The Norwegian authorities disallowed it to anchor but inspite of this refusal the City of Flint under the control of the German crew anchored in the Norwegian port. The Norwegian Government ordered the temporary internment of the German crew and the release of the City of Flint was given to its American crew. This case clearly shows that the German had no respect for neutrality. In December 1939 the Allies contrary to the Declaration of Paris issued orders for the capture of enemy export on neutral vessels in counter-retaliation of the German action of sowing mines in British

waters. Early in 1940 the Allies, on the ground that Norway was abusing its neutrality in allowing through its neutral waters passage for enemy vessels, sent the British destroyer Cossack into Joesing Ford, the Norwegian territorial waters. While there it attacked the German naval supply ship Altmark and succeeded in getting the release of 300 British seamen who were held as prisoners. Both Germany and Norway protested The British Government instead of offering a justification admissible under the law replied by a threat to close Norwegian waters to German shipping. Soon after the British sowed mines along Norwegian waters to prevent the transport of Swedish ore to Germany. The Nazi invasion of Norway soon followed and the Germans sought to justify it on the ground that Norway failed to discharge its obligations as a neutral and that it was in immediate danger of being invaded and conquered by the Allies to its great detriment. The Nazi Germany had its own justification to violate the neutrality of Belgium, Luxemburg, Holland and Denmark.

Neutral territories were also violated by belligerent air craft soon after the commencement of war. The Danish town of Esbjerg was bombarded from the air—on September 4, 1939. A few days after Belgium planes fought with two British craft returning from flight over German territory. In 1940 a German military plane violated Netherland territory and also fired upon a Netherland patrol plane. During the course of armed conflict between Finland and Russia, the neutral Swedish town of Pajala was bombed by a Russian craft.

A complete catalogue ef events leading to violation of neutrality is neither possible nor desigable. It will suffice to say that the belligerents did not at all during this war refrain from violating neutral territories and from failing to discharge their obligations towards neutrals.

CHAPTER LVII

RIGHT OF ANGARY

Ancient right of Angary.—The right of angary or *jus angariae* (literally meaning a right of transport) as a rule of International Law had its origin in the Middle ages when belligerents often stood in need of hiring vessels and men for

transport of their provisions. The *jus angariae* or the right of angary entitled belligerents to sieze neutral merchantmen and their crew and to compel them to render transport services to them on payment of freight. This freight was paid in advance. According to *Oppenheim* the original right of angary was "to lay an embargo on and seize neutral merchantmen in their harbours and to compel them and their crew to transport troops, munition and provisions to certain places on payment of freight in advance."[1] In exercise of this right the belligerents caused great disturbance in neutral commerce and the States found it necessary to conclude treaties whereby they agreed to give up their right of angary. A number of such treaties were concluded in the seventeenth century.

Modern right of Angary.—The ancient right of angary extended to both the neutral vessel and its crew. But the modern right is limited only to neutral property. The modern right is "the right of belligerent to destroy or use in case of necessity for the purpose of offence and defence neutral property on their territory or on enemy territory or on the open sea."[2]

The special features of the modern right of angary are:—

(1) The right vests in belligerents.

(2) The right is to be exercised only in case of necessity or in time of national emergency.

(3) The right can be exercised in respect of neutral property of all kinds such as vessels, other means of transport, arms, ammunition, provisions, and other property serviceable in war operations. According to Hague Convention V the belligerents have a right of seizing railway material belonging to neutrals in case of absolute necessity on payment of compensation.

(4) The neutral property in respect of which the right may be exercised must be on the belligerent or enemy territory or on the open sea.

(5) The exercise of this right is subject to payment of full compensation to the owner of the neutral property.

(6) The right consists in using or destroying the neutral property.

It must however be noted that the right of angary is not

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1. **Oppenheim—International Law Vol. II (Seventh Ed.) p. 759.**
2. **Oppenheim—International Law Vol- II (Seventh Ed.) p. 761.**

deriving from neutrality, but it is a right deriving from the law of war.[1]

In its protests against the requisition of Dutch vessels by the Allies in 1918 the Dutch Government challenged the right of angary of the British Government and characterised the alleged right as "an ancient rule unearthed for the occasion and adopted to entirely new conditions in order to excuse seizure enmasse by a belligerent of the merchant fleet of a neutral country." The British Government made a full exposition of the rule of International Law relating to the modern right of angary and maintained that the vessels were seized in accordance with International Law and practice.

Franco—German War and right of angary.—The right of angary found wide application during this war. The Germans seized hundreds of Swiss and Austrian railway carriages lying in France and utilized them for military purposes. The rules as to payment of compensation came in for test during this war. The Germans seized some British coast vessels lying in River Seine and sunk them in order to prevent French gunboats from coming up the river. The British Government lodged a protest. The German Government while justifying the action on the ground of pressing danger refused to concede to the principle that there was a duty to indemnify the owners of the vessels sunk. Ultimately Germany agreed to pay compensation.

Right of Angary and the First World War.—The First World War witnessed the application of the right of angary on a wide scale. The United States during the war in exercise of its right of angary seized seventy one Dutch vessels lying in its harbours on payment of compensation and the protests made by the Dutch Government proved fruitless. Great Britain, France and Italy also exercised this right. The case of *Zamora* decided by the Privy Council is an illustration of the abuse of the right of angary A Swedish vessel with cargo of grain and copper on its way from New York to Stockholm entered a British Port. Great Britain requisitioned copper lying on board the vessel. The Prize Court held that the requisition was valid but the Privy Council decided against Great Britain on the ground that it was not proved to its satisfaction that the article requisitioned was urgently needed for the defence of the realm. This case lays down the principle that right is subject to a condition of urgent necessity for the property to be requisitioned.

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1. Oppenheim—International Law Vol. II (Seventh Ed.). p. 765.

Limitations of the right of Angary.—The right of angary is derived from the law of war and has its own limitations. The right of a belligerent to use or destroy in case of need neutral property can be exercised while the neutral property is within its territory or on enemy territory or on an open sea. Neutral property on neutral territory is not subject to this right. A belligerent cannot in exercise of the right of angary compel neutral individuals to render services to him. There are some writers, *e. g.*, *Rollin* and *Bullock* who are of the opinion that the right of angary rests on territorial sovereignty and it cannot be exercised in respect of neutral property either on open sea or on enemy occupied territory.

The Privy Council in the case of the *Zamora* declared that a belligerent has by International Law "the right to requisition vessels or goods in the custody of its prize courts pending a decision of the question whether they should be condemned or released but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war or other matters involving national security. Secondly, there must be a real question to be tried so that it would be improper to order an immediate release. And thirdly, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable."[1] A belligerent has thus no unrestricted right to requisition vessel or goods which are in the custody of its prize court.

The right of angary depends on the existence of necessity and cannot be exercised when no necessity exists. According to *Bullock*, (a) it is the right of a State to requistion foreign ships, aircraft and other means of transport, (b) which are urgently required for purposes of transport and (c) which are at time of requisition within its territorial jurisdiction; but such requisition can only be made; (d) in time of national emergency; and (e) subject to payment of full compensation, whilst (f) the services of foreign personnel (as, for example, the crews of the ships and aircraft) cannot be compelled in any circumstances."[2] The modern right of angary as judicially recognised is not only confined to requisition of the means of transport but extends to other properties also which are servicable to military wants.

1. The Zamora (1916) 2 A. C. 77.
2. Bullock: The British Year Book of International Law, (1922-1923) p. 99-129.

CHAPTER LVIII

BLOCKADE

Modern Blockade.—It was in sixteenth century that blockade as a means of warfare was made use of for the first time. Since then there has been development in the law relating to blockade. It was not until the middle of the nineteenth century that the rules of International Law relating to blockade became settled. The Declaration of Paris of 1856 and the unratified Declaration of London of 1909 have made valuable contribution to the development of the law relating to blockade. It was the Declaration of Paris which rejected the so-called paper blockade of earlier days and enacted that blockades should be effective or maintained by a force sufficient really to prevent access to the coast of the enemy. Nearly all the States of the World have accepted the principle of effective blockade and the Declaration of Paris may be deemed to state general International Law. Although the Declaration of London is still unratified, it embodies a full code on the law of blockade. The modern rules relating to blockade are deducible from the practice of States.

Oppenheim defines blockade as "the blocking by men-of-war of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress or egress of vessels or aircraft of all nations." The special features of a modern blockade are:—

(1) The blockade must be affected by men-of-war ;

(2) The approach to the enemy coast or a part of it must be blocked. In earlier times blockade was limited to ports or fortified ports but it was generally accepted on the eve of the First World War that the blockade may extend to ports as well as to the whole or a part of the enemy coast. The practice of States shows that not only ports but the enemy coast in its entirety or in part can be blockaded. The Declaration of London provided that" a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy and that "the blockading forces must not bar access to neutral ports or coasts."[1]

(3) The purpose of the blockade must be to prevent egress from and ingress into, the enemy coast.

1- Oppenheim—International Law, Vol. II, (Seventh Ed.) p. 768.

(4) It must be an universal blockade, that is to say, the vessels or the aircraft of all nations without any discrimination be prevented from ingrss or egress. The blockade must be applied impartially to the vessels and aircraft of all nations.

(5) The blockade may be to prevent either egress or ingress or both egress and ingress. If the blockade is for only ingress it is called 'blockade inwards' but if it is for egress only it is known as 'blockade outwards.' The blockade of the Danube in the Crimian war of 1854 was a 'blockade inwards'

(6) The blockade may be either strategic or commercial. It is strategic if it is in furtherance ofeffective military operations or for the purpose of cutting off the supplies of the enemy. It is commercial if the sole purpose is to stop altogether the intercourse of all nations with the enemy coast or port.

(7) The blockade must in all events be effective and real, that is to say, the blockade must be such as may offer a real danger to the vessels attempting to evade it. The blocking of the enemy coast must be by a sufficient number of men-of-war in such a manner that any vessel which seeks to approach the blockaded enemy coast by passing through the line of blockade is exposed to serious danger.

Blockade of rivers, straits and canals.—The law as to blockade of rivers, straits and canals can be said to be settled so far. The law as stated by *Oppenheim* on the points is briefly this[1] :—

(1) National rivers *i. e*, rivers which are situate wholly from source to mouth in the territory of one State may be blockaded.

(2) Boundary rivers and not national rivers which belong to more than one State can only be blockaded if they belong to States which are enemies of the blockading State or which are co-belligerents with blockading State.

(3) International rivers which are declared to be free and open to all States cannot lawfully be blockaded.

(4) Straits which separate territory belonging to one and the same State and which do not connect two parts of the open sea can be blockaded.

1. Oppenheim—International Law, Vol. II (Seventh Ed.), p. 773.

(5) It is doubtful whether straits which separate territory belonging to one State but which also connect two parts of the open sea can be blockaded. According to the Convention of Montreux of 1936 no State which is a signatory to the Convention can block such straits.

(6) It is also doubtful whether straits dividing two different States can be blockaded.

(7) Canals which are within the territory of only one State can be blockaded. The law as to blockade of inter-oceanic canals is still unsettled.

Establishment of blockade.—A blockade is established by (1) declaration (2) by notification or according to the practice of Great Britain, the United States and Japan by actual blocking.

1. **Declaration.**—The declaration that the enemy coast or port is blockaded must be made under the authority of the blockading State. The Commander of the blockading State unless authorised by his Government cannot declare a blockade. According to the unratified Declaration of London 'a declaration of blockade is made by the blockading Power or by naval authorities acting in its name.' The naval authority may have either a general order for blockades from his Government or an order for a particular blockade. In the case of the *Zamora* Lord Parker observed that an Order declaring a blockade will *prima facie* justify the capture and condemnation of vessels attempting to enter a blockaded port but will not preclude evidence to show that the blockade was ineffective and therefore unlawful[1].

2. **Notification.**—Mere declarations of a blockade without making such blockade known to other States is not sufficient to establish a blockade as understood in International Law. The blockade must be made known to other States. States in general with the exception of Great Britain, the United States and Japan consider that notification of a blockade is essential. The usual practice is that the naval commander of the blockading State sends a notification of the blockade to the authorities of the coast or port blockaded, to the foreign consuls stationed there and to all the neutral maritime States. Italy and France take a further precaution by notifying the fact of blockade to every neutral vessel approaching the scene of blockade. Great Britain, the United States and Japan

1. (1916) 2 A. C. 77.

however do not consider notification essential. According to these States the knowledge that a blockade has been established is conveyed to other States by the very fact that the approach to enemy coast or port has been blocked and that a *de facto* blockade is sufficient information to neutral vessels

As soon as a blockade is established no vessel can be allowed to get ingress, but neutral vessels which happen to be on the blockaded port or on the blockaded coast at the time of the establishment of the blockade must be allowed egress within a reasonable time.

It may, however, be noted that if a vessel which has actual knowledge of the blockade inspite of the fact that there has been no notification and which tries to commit breach of the blockade is liable to be captured. It was held in the case of the *Adula* that actual knowledge on the part of the captured vessel of the existence of the blockade would justify the treatment as a blockade runner of the vessel attempting to enter the blockaded coast, although there had been no diplomatic notification of the blockade to neutrals.[1]

Declaration of London.–It is unfortunate that Declaration of London has so far remained unratified. The principles laid down therein may thus not be binding but they afford useful guidance to States in adopting their course of conduct. According to the Declaration in order that a blockade might be binding there must be a declaration of blockade as well as notification. The rules laid down in the Declaration of London with respect to declaration of blockade and notification may be stated briefly thus :—

(1) The declaration of the blockade is to be made either by the blockading power or by naval authorities acting in its name.

(2) The declaration of blockade is to specify the date when blockade began, the geographical limits of the coast line under blockade, and the period of time allowed to neutral vessels to come ont.

(3) If there was any mistake as to the date of commencement of the blockade or as to the geographical limits of the coast line under blockade, the blockading State is bound to make a fresh declaration.

(4) If the declaration omitted to specify the period allowed to neutral vessels to pass out, the blockading State is bound to allow the neutral vessels to go out freely.

1. 176 U. S. A. 361.

(5) That the notification is to be made at once.

(6) That it is necessary to make two notifications :—

(a) a notification by the Government of the blockading fleet to all neutral governments ; (b) a notification by the officer commanding of the blockading force to the local authorities.

(7) The rules as to declaration and notification are to apply to extended blockade or to a blockade re-established after having been raised.

End of blockade.—A blockade comes to an end when:—

(1) the war comes to a close ;

(2) the blockading State voluntarily raises the blockade or puts any restrictions on the limits of the blockade ;

(3) the enemy force drives off the blockading force ;

(4) the blockade ceases to be effective ;

(5) the blockading State captures and occupies the blockaded coast or port.

In case the blockading State raises the blockade voluntarily it has to notify this fact to neutral States. If the blockading forces after being driven off return and resume the blockade they have to make a declaration and notification as is needed in establishing a new blockade.

Blockade when Effective.—It is universally recognised that a blockade to be binding must be effective and non-fictitious. This rule of effectiveness of a blockade requires the blockade to be maintained by such force as may make it dangerous for a vessel to have ingress or egress. The question as to what constitutes an effective blockade is difficult to answer. The First Armed Neutrality of 1780 lays down that a port should be considered blockaded if the blockading belligerent had stationed vessels there so as to create an obvious danger for neutral vessels entering the port. The Declaration of Paris enacts that a blockade should be maintained by a force sufficient really to prevent access to the coast of the enemy. Writers are however not unanimous as to when a blockade should be deemed to be effective. *Phillimore* observed : that 'a blockade *de facto* should be effected by stationing a number of ships and forming as it were an arch of circumvallation round the mouth of the prohibited port, where, if the arch fails in

anyone part, the blockade itself fails altogether." A group of writers maintain that there should be a chain of men-of-war stationed so close to one another that it may render egress or ingress dangerous. Some other writers do not consider a line of men-of-war necessary but hold the view as was expressed in *Northcote* v. *Dauglas*, *The Franciska* by Dr. Lushington who held that in order to make blockade effective "the blockaded place must be watched by a force sufficient to render egress or ingress dangerous ; or in other words, save under peculiar circumstances, as fogs, violent winds and some necessary obstacle, sufficient to render the capture of vessels attempting to go in or out most probable."[1] In another case *Jeipel* v. *Smith* it was held that "in the eye of law blockade is effective if the enemy's ships are in such numbers and positions as to render running the blockade a matter of danger, although some vessel may succeed in getting through."[2]

It may be notedthat the test of the effectiveness lies in the real danger to the vessel seeking to have egress or ingress and that it is not necessary that the blockading force should be stationed in such a way as to form an impenetrable line or an arch of circumvallation. The blockade during Crimean war by a single British cruiser stationed at a distance of one hundred twenty miles from the blockaded port of Riga was held to be effective. *Starke* states : "The size of the blockading force and the distance at which it operates from the blockaded coast are alike immaterial provided the test of danger to neutral vessels is satisfied."[3]

"The blockade is to be maintained by men-of-war aided by other agencies, such as air-craft. There can, however, be no blockade without men-of-war. No blockade can be maintained purely by air-craft, inasmuch as a blockade is a naval institution."[4]

Long Distance Blockade.—This kind of blockade is the product of the First World War with its new instruments of naval warfare. In the early stages of the First World War when Germany indiscriminately laid mines on the high seas, Great Britain announced that it would take similar measures in self-defence. The announcement was followed by the estab-

1. (1855) Spinks, 287.
2. (1872) L. R. 7, Q. B. 404.
3. J. G. Starke—An Introduction to International Law (2nd Ed.) p. 339.
4. Oppenheim—International Law, Vol. II, p. 781.

lishment of mine-fields in North Sea. Germany retaliated and declared the waters round the British Isles a War Zone and proclaimed that all enemy vessels whether of commerce or war found within this War Zone would be destroyed and that neutral ships would be exposed to danger. Great Britain by an Order in Council dated 11th March, 1915 announced its intention "to detain and take into port ships carrying goods of presumed enemy destination, ownership or origin." This Order though passed with a view to prevent commodities from leaving or reaching Germany, did not suggest that a blockade was contemplated. The British Foreign Secretary announcing the policy as enbodied in the Order stated : "The British Fleet has instituted a blockade, effectively controlling by cruiser 'cordon' all passage to and from Germany by Sea."

This measure of a long distance blockade preventing even neutral vessels access to Germany evoked resentment of neutral countries. The United States lost no time in denouncing it as an illegal measure injurious to neutral trade and lodged a protest on the following three grounds :—

(1) That the measures adopted by Great Britain amounted to a blockade covering so great an area of the high seas and maintained by Cordons of ships stationed at such great a distance from the affected area that neutral vessels must pass through the blockading force to reach neutral ports which Great Britain as a belligerent has no right to blockade. It was urged that these measures had the effect of blockading neutral ports.

(2) That the new blockade did not "bear with equal severity" upon all neutrals inasmuch as the blockade did not interrupt trade between Scandinavia and Germany.

(3) That the blockade was not effective as German coasts were open to trade with the Scandinavian Countries and German vessels cruised both in the Baltic and North Sea, and capture and seize neutral vessels bound for Scandinavian and Danish ports.

The United States urged that the British long distance blockade, on the ground set forth above, did not constitute a blockade in law, in practice, or in effect. Great Britain made a reply in which it asserted that the measures in question were "no more than an adaptation of the old principles of blockade to the peculiar circumstances" and pleaded in justification that "if this can only become effective by extending it to enemy commerce passing through neutral ports, such an extension

is defensible and in accordance with principles which have met with general acceptance." Great Britain further assured that it was making every effort to discriminate between *bonafide* neutral commerce and that intended for Germany. As a matter of fact it made elaborate arrangements for safeguarding *bonafide* neutral trade. Thus the institution of long distance blockade came to stay.

The 'long distance blockade' was reinstituted in the Second World War with greater severity. Confronted with indiscriminate mine-fields and sub-marine warfare Great Britain in 1939 made an Order in Council which provided that every merchant vessel which sailed from an enemy port after December 4, 1939 would be required to discharge in a British or Allied port all goods on board laden in such enemy port. The order made the same provision for vessels sailing from a port other than an enemy port having on board goods of enemy origin or of enemy ownership. This order was followed by other Retaliatory orders which had the effect of stopping all German export and import trade. These measures were justified by the necessity of carrying on total economic warfare against Germany. The adoption of these measures shows that in modern warfare calling for the use of economic measures the right of neutrals to an unimpaired commercial intercourse with belligerents has been much restricted.

Breach of blockade.—The object of a blockade is to prevent ingress or egress. The blockade is violated when its object is frustrated by vessels getting or attempting to get access to or exit from the blockaded coast or port. A breach of blockade is committed by (1) actual entry into or exit from the blockaded area or (2) by an attempt of a vessel to pass through the blockade. According to *Oppenheim* "breach or violation of blockade is the unpermitted ingress or egress of a vessel inspite of the blockade."[1]

A vessel can be held guilty for a breach or violation of a blockade only when it is proved that it had knowledge of the blockade. Knowledge on the part of the guilty vessel is essential for an offence of breach of blockade. It is to convey knowledge of a blockade that the practice of States with the exception of Great Britain, America and Japan, regard notification essential for a binding blockade. Such a notification when given raises a presumption that the vessel has knowledge of the existence of the blockade. As already stated France and Italy take greater care and do not regard a vessel guilty of breach

1. Oppenheim—International Law Vol. II (Seventh Ed.) p. 782.

of blockade if it had not been before her egress or ingress given a warning by a blockading cruiser.

It has already been stated that America, Great Britain and Japan do not consider notification essential and that a *de facto* blockade is sufficient to impart knowledge of its existence. According to these States the mere fact that the approach is blocked with the result that ingress or egress of neutral vessels is actually prevented is sufficient to make the existence of the blockade known. These States therefore insist that a vessel to be guilty of breach of blockade must have either actual or constructive notice of the existence of the blockade. A vessel has actual notice of the blockade when it gets a warning from the blockading force or gets knowledge of the existence of the blockade either from a public or private source. It is said to have constructive notice when a diplomatic notification has been sent to its home State or when the blockade has gained such a notriety that every one is presumed to have knowledge of its existence.

In the case of the *Hiawatha* it was declared by the United States Supreme Court that it is the settled rule of law of nations that a vessel in a blockaded port must be presumed to have notice of the blockade as soon it commences.[1]

Attempt Constituting Breach.—As already stated an attempt to get access into or exit from a blockaded port or coast is a breach of blockade. The question as to what acts constitute an attempt to commit a breach of the blockade is important in view of the absence of an uniform rule of International Law. The practice of States varies greatly on the point. According to the second Armed Neutrality of 1800 the employment of force or ruse by a vessel on the line of the blockade constituted at attempt to break the blockade. Some States including Japan regarded mere endeavour without force or ruse to pass through the blockade as sufficient to constitute breach of blockade.

According to the practice of Great Britain and the United States there is an attempt to commit breach of blockade if a vessel which is according to ship's papers not destined for a blockaded port is found near it and steering for it. These States applied the principle of "Continuous Voyage" to blockade. According to this principle the attempt is complete if a vessel which is ostensibly destined for a neutral port really

1 The Prize Cases (1862) 2 Black 635: Green—International Law through cases p. 775 at p. 781

goes to a blockaded port after touching its ostensible destination.

American practice during its civil war was: (1) to condemn vessels which knowingly carried to neutral ports cargo which was ultimately destined for a blockaded port (2) to condemn cargo ultimately destined for a blockaded port carried by a vessel which had no knowledge of its ultimate destination. The practice led to the condemnation of the cargo on board the *Springbok* a British vessel destined for the neutral port of Nassau on the ground that the vessel had no knowledge of the ultimate destination of the cargo carried by it The court observed :—"We cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transhipped at Nassau to a smaller vessel more likely to succeed in reaching safely a blockaded port than the *Springbok*; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation if captured during any part of the voyage, attached to the cargo from the time of sailing."[1]

Consequences of breach of blockade.—A vessel guilty of the breach of blockade is captured and then brought before a Prize Court to receive the penalty. The penalty may either be confiscation of the vessel or of the cargo.

A vessel can be captured during the period it is making the breach of the blockade or it is making attempt to commit the breach. "It is universally recognised that a vessel may only be captured for a breach of blockade while *in delicto*; that means during an attempt to break the blockade or during the breach itself."[2]

No unanimity exists as to when a vessel is to be considered *in delicto*. The Continental practice is to treat a vessel to be *in delicto* when it is actually on the line of the blockade or while it is being pursued by a man-of-war of the blockading force. The practice of Great Britain and the United States is to hold a vessel to be *in delicto* so long as she has not completed her voyage from the blockaded port to the port of her destination and back to the port from which she started originally.

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1. The Springbok—Fenwick cases, 763.

2. Oppenheim—International Law Vol. II (Seventh Ed,) p. 788-789.

Penalty.—International Law imposes individual responsibility for the breach of blockade and gives a right to belligerents to capture guilty vessels and get them confiscated through the decision of Prize Courts.

The penalty for breach of blockade is either the confiscation of the guilty vessel or the goods on board the vessel or both. The penalty is imposed by the Prize Court before which vessels are brought after capture. International Law does not provide for any rule relating to penalty to be imposed on guilty vessels and the practice of States is, therefore not uniform. The general rule appears to be to confiscate both the guilty vessel and the cargo. But the practice of Great Britain and America is : (1) to confiscate both the vessel and cargo in case the owner of the vessel and the cargo is the same, (2) to confiscate only the cargo in case the owner of the vessel was ignorant of the ultimate destination of the cargo (3) to confiscate both the vessel and the cargo not belonging to the same owner if the owner had knowledge of the blockade at the time the cargo was shipped for the blockaded port.

CHAPTER LIX

CONTRABAND

Concept of Contraband and meaning.—The doctrine of Contraband like that of blockade supplies belligerents with powerful means of Sea Warfare and operates to restrict the right of the neutral States to carry on their commerce with the enemy. The law relating to contraband provides the right to belligerents to capture and seize goods which are destined to be used in War against them.

The word 'Contraband' is derived from Latin words '*contra*' and '*bannum*' or '*bandum*' meaning 'in defiance of injunction'. The term in its ordinary sense means goods which are prohibited, but in International Law it has acquired a definite technical meaning and is used for goods which belligerents regard as objectionable and liable to be intercepted on their way to enemy. The liability of contraband goods to seizure by the belligerents rests on the ground that their carriage to the enemy will assist him in the War and would prolong its resistance.

The term 'contraband' includes all articles having enemy destination and likely to be used for purposes of War. Huge controversy exists as to what are and what are not contraband goods. The meaning of the term 'contraband' in International Law according to well known writers may be stated :—

Oppenheim.—"Contraband of War is the designation of such goods as are forbidden by either belligerents to be carried to the enemy on the ground that they enable him to carry on the War with greater vigour."[1]

Starke.—"Contraband is the designation for such goods as the belligerents consider objectionable because they may assist the enemy in the conduct of war."[2]

Kelsen.—"Contraband of War are goods the transport of which to the enemy is forbidden by either belligerent in conformity with general International Law."[3]

Grotius on Contraband.—The question as to what goods were contraband of war was answered by Grotius. He did not use the term 'contraband' but he enquired into the question as to what articles destined for the enemy in war were such as to entitle belligerents to capture them on their way to the enemy. He made a three-fold classification of all the articles. In the first class he puts all those articles which are by their very nature useful in warfare *e g.* arms and ammunition. As regards these articles Grotius was of opinion that a belligerent was always justified in seizing them on their way to the enemy because a neutral carrying them became 'of the party of the enemy'. In the second class come those articles which are of no use in war and Grotius held the view that a belligerent could not seize them. The third class contained articles which were 'useful both in war and out of war, such as money, provisions, ships and other fittings'. The seizure of these articles according to Grotius depended on the circumstances and conditions of a particular war, for an article usually useful in peace may become useful in a particular war.

This classification though came in for a good deal of criticism, was followed by many States till the end of the nineteenth century.

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1. Oppenheim—International Law Vol. II (Seventh Ed.) p. 799.
2. J. G. Starke—An Introduction to International Law p. 331.
3. Hans Kelsen—Principles of International Law p. 79.

Classification of Articles.—The above definitions fail to answer the question as to what articles are to be regarded as contraband of war. This question raised an international controversy inasmuch as States differed as to what articles destined to the enemy are to be considered to be of such military advantage to him as to justify a belligerent to capture them. Grotius grouped all articles into three classes. The first class consisted of articles such as arms and munitions of war which are obviously used only in war. These articles are to be always regarded as contraband of war. The second class consisted of those articles such as articles of luxury which are never used in war and are never contraband. The third class consisted of articles such as money, provisions, ships and articles of naval fittings which are useful both in war and out of war. Grotius was of opinion that the articles of this class might be regarded contraband by the belligerents and might be captured by them if it appeared to them that their carriage to the enemy was likely to strengthen its resistance and prolong the war. Much of the controversy centred round the third class of articles which were useful both in war and during peace. The United States Supreme Court in the case of *Peterhoff* observed :—

> "The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable ; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes : (1) articles manufactured and primarily or ordinarily used for military purposes in time of war ; (2) articles which may be and are used for purposes of war or peace according to circumstances ; and (3) articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband ; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent ; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or seige".[1]

The classification of Grotius was accepted by the Great Britain and America which drew up long lists of articles which

1. 5 Wallace 28 (1866) Fenwick, Cases, 773. Hudson, Cases, 1375.

were always contraband and of those which were contraband under certain conditions. The other States made their own lists. France and other States on the continent framed a list of articles of absolute contraband and ruled out articles which were occasionally or conditionally contraband. A comparison of the lists of various States revealed great divergence of views. A number of treaties between different States were also concluded for the purpose of making an agreed list of contraband goods. These treaties, too, differed widely in their lists and no unanimity among States appeared to be possible.

The Declaration of London (1909)—This Declaration marks an attempt to reach a settlement as regards contraband of war in order to ensure peaceful trade. It drew up three lists. The first list was of articles of *absolute contraband*, that is to say, of articles which were useful only in war. The second was the list of articles of *conditional contraband*, *i. e*, articles which 'were susceptible of use in war as well as for purpose of peace.' The third was a '*free list*' consisting of articles 'not susceptible of use in war' or the possibility of the use of which in war was so remote as practically to make them not susceptible of use in war.' Articles which were classed as *absolute contraband* were arms, ammunition, military and naval stores. *Conditional contraband* were articles of food, and other provisions, fuel, ships, coal, gold, silver and railway material. The '*free list*' consisted of articles of luxury which are not at all useful in war. This free list also included articles like raw cotton, hemp, rubber and metallic ores.

This Declaration however, remained unratified but its merit lies in the fact that it continued to guide the States till the First World War. During this war the list of absolute contraband was very much enlarged. The list of absolute contraband drawn up by Great Britain during the Second World War contained all kinds of arms, ammunition, explosives, chemicals which are useful in war, machines and other articles necessary for their production, fuel of all kinds, all contrivances or means of transportation on land, sea or air and machines used in their manufacture ; all means of communications, tools, implements, instruments and equipments, coin, bullion, currency evidence of debt ; metal, materials, dyes, plates machinery or other articles necessary for their manufacture.

Absolute and Conditional Contraband.—A distinction is drawn between absolute and conditional contraband. Articles which are by their very nature useful for purposes of war are

absolute contraband. Such articles are arms, ammunitions, military and Naval stores etc.

Articles which by their nature are not necessarily useful in war but which can under certain circumstances and conditions be of use in warfare come under the term of 'conditional or relative contraband'. These are the articles which can be of use both in war and peace, such as, food, fuel, etc.

This distinction is often lost sight of as the belligerents in peculiar circumstances of a particular war are free to regard articles as contraband of war. Although Great Britain and America followed the classification made by Grotius, other continental States including France drew out their own lists of absolute contraband and did not adhere to the distinction between absolute and conditional contraband. Many States entered into treaties for the purposes of describing what articles were to be regarded as contraband of war between parties. These treaties varied in their lists of contraband of war and no uniform rule can be deduced from them.

The distinction between absolute and conditional contraband is rather fine for an article useful in time of peace may become useful to a belligerent in its military operations under certain circumstances. Articles of food are necessary in war as well as in peace and there are some writers who are of opinion that foodstuffs are not conditional contraband while others maintain that foodstuffs destined for the enemy are contraband and might be captured. Great Britain, America and Japan regarded foodstuffs as conditional contraband. In 1904 Russia held rice to be absolute contraband during the Russo—Japanese war but on the protest of Great Britain and America it was regarded to be conditional contraband. In the case of the *Jonge Margaretha* the British Prize Court held that cheese destined for enemy port was contraband. Again during war between Great Britain and the United States grain destined for the British fleet lying at a neutral harbour was held to be contraband.

The test of a contraband lies in the hostile destination of the article. An article of ambiguous use destined for either belligerent gets the character of a contraband and becomes liable to seizure. Coal, precious metals, raw cotton, are articles which when destined for the use of the enemy become contraband goods. The usefulness of coal in naval warfare is obvious and Great Britain has always held it to be conditional contraband. Other kinds of fuel such as mineral oils are also conditional contraband. Precious metals can be coined into

money and if they have an enemy destination they are contraband. Similar is the case of raw cotton.

With regard to articles of conditional contraband a State may find it necessary under the circumstances of war to declare them absolute contraband. During the First World War 'raw cotton', linters, cotton waste, cotton yarn, and other cotton goods were declared by the Allies to be absolute contraband.

Hostile destination.—As already stated, it is hostile destination that makes goods contraband. If goods are intended for the use of the enemy and are being sent to him they acquire the character of contraband. Goods having hostile destination on board a vessel bound for a neutral port are contraband. Also, goods not having a hostile destination on board a vessel touching an enemy port on its way to a neutral port are also considered contraband.

Article 30 of the Declaration of London provided that articles of absolute contraband have a hostile destination if it is shown that they are being sent either to the enemy territory or to the territory occupied by the enemy or to the armed forces of the enemy. The Declaration further provides that articles of absolute contraband should be considered to have hostile destination if the vessel which carries them calls at enemy port, or touches at an enemy port or meets the armed forces of the enemy before reaching the neutral port to which the cargo is consigned. According to Article 33 of the Declaration articles of conditional contraband are to be considered to have hostile destination if they are intended for the use of the armed forces of the enemy or for the use of the Government department of the enemy State unless it is shown that the articles could not be used for the purposes of war. Article 34 of the Declaration contains a presumption which is rebuttable that articles of conditional contraband have a hostile destination when they are consigned to enemy authorities or to an enemy contractor established in the enemy country who is known to supply articles of this kind to the enemy or to a fortified place of the enemy or to another place serving as base of the armed forces of the enemy. These rules with some modifications were adopted by the Allies in the First World War before the passing of the Maritime Rights Order-in-Council of July 7, 1916.

According to this Order in Council the hostile destination of the articles was to be presumed until the contrary was shown, if the goods were consigned to or for an enemy authority, or the agent of the enemy State or to or for a person in territory

belonging to or occupied by the enemy or toor for a person who during the present hostilities had forwarded contraband goods to an enemy authority or an agent of the enemy State or to or for a person in territory belonging to or occupied by the enemy or if the goods were consigned 'to order' or if the ship's papers did not show who was the real consignee of the goods.

Free Articles.—Free articles are those which cannot be declared contraband even if they have hostile destination. There is however no agreement as to what are free articles. The free list drawn up by the Declaration of London was not adopted in its entirety by the belligerents in First World War. A belligerent has a right to declare articles as contraband and may declare an article of the free list as contraband.

The Declaration of London laid down the rule that articles for the exclusive use of the sick and the wounded are not contraband even if they are destined for the use of the enemy. It has given another rule that articles for the use of the vessel or for the use of her crew and passengers are free and are not liable to be considered contraband.

Carriage of contraband.—Although neutrals have a right to carry on their trade with either belligerents, they are liable to be punished by belligerents for carriage of the contraband on the ssa. International Law permits belligerents to prohibit and punish carriage of the contraband.

The Declaration of London in detail describes carriage of conditional and absolute contraband. According to Article 32 a vessel is considered to be carrying absolute contraband if it appears either from her papers or from the direction of her sailing that she is bound for an enemy port. Even if the vessel is bound for a neutral port and the goods on board the vessel have a neutral destination she would be considered to be engaged in carrying contraband in case she only touches at an intermediate enemy port or is to meet armed forces of the enemy before reaching the neutral port to which the goods in question are consigned.

According to the Declaration of London a vessel is considered to be carrying conditional contraband if her papers show her to be destined for an enemy port or if being clearly found out of her course to a neutral port indicated by her papers she was unable to find adequate reasons to justify such deviation.

The practice of Great Britain and the United States of America is in conformity with the above rules.

Doctrine of continuous voyage.—"The doctrine of continuous voyage offered a device which was employed by the Prize Courts to frustrate evasion by neutral traders of belligerent prohibitions such as those forbidding participation in the colonial trade of the enemy, or the carrying of contraband to its territory, or the attempting to break a blockade of its coasts."[1] The doctrine applies when a vessel carrying contraband in the first instance goes to a neutral port and thence to some ulterior and hostile destination. The voyage of such a vessel to the neutral port and thence to the hostile destination is considered to be one continuous voyage and the intermediate neutral destination is treated to be of no consequence in determining the question of carriage of the contraband. The doctrine of continuous voyage was first applied to the trade prohibited under the rule of 1756. In the eighteenth century trade with colonial possession was exclusively confined to the vessels of the home country. In 1756 France during her war with England on account of England's maritime supremacy found it impossible to carry on trade with her colonial possessions. France issued licences to Dutch vessels to carry on the trade with French colonial possessions. England ordered her men-of-war to seize all Dutch vessels who were carrying on trade with French colonial possessions on the ground that these vessels had acquired enemy character by reason of the fact that they were carrying on a trade from which their country was excluded in times of peace. Since then the rule that neutral States have no right in time of war to carry on such trade of the belligerent as was closed to them in time of peace has been known as the rule of 1756. To avoid seizure by the enemy warships under the rule of 1756 the neutral vessels engaged in French colonial trade started the practice of taking their cargo in the first instance to a neutral port, landing and paying import duties there and thereafter reloading it and then going to the port of the mother-country of the particular colony. This device adopted by the neutral vessels for avoiding their seizure by British men-of-war did not succeed owing to the application of the doctrine of continuous voyage by the British Prize Courts which considered the voyages from the colonial port to the neutral port and thence to the enemy port as one continuous voyage. In the case of the *Williams* the doctrine of continuous voyage was applied to a vessel which after taking cargo from a Spanish port went to the port of Marblehead, a neutral port, landed the cargo and paid import duties there and then re-shipped a greater part of the original cargo from that

1. Hyde—International Law, Vol III, p. 2130.

port and took it to a Spanish port.[1] In this case the voyage to the neutral port and thence to the enemy port was treated to be one continuous and indivisible voyage.

According to *Pitt Cobbett* "the doctrine consists in treating an adventure which involves carriage of goods in the first instance to a neutral port and thence to some ulterior hostile destination as being regarded for certain purposes, only one transportation with all the consequences that would attach if the neutral port had not been interposed." This doctrine applies only if there has not been a genuine importation of goods in the neutral territory. It is mere show of importation of goods at neutral port that brings into operation the doctrine of continuous voyage.

The doctrine of continuous voyage found its development in its application to cases in which the vessel had a neutral destination but the cargo that it carried had a hostile destination. The doctrine was applied to cases where contraband goods carried by a neutral vessel were in the first instance unloaded at neutral port and thereafter transported by another vessel or by other means to a hostile destination. In its application to such cases of transportation the doctrine is often termed as 'the doctrine of continuous transportation.' This doctrine of continuous transportation came into prominence during the American Civil War. *Hyde* observes : "During the Civil War large quantities of various forms of military supplies reached the blockaded ports of the Confederacy by means of an elaborate and successful system of blockade running. Such supplies originating in England were carried on in English ships to neutral ports in the West Indies where they were transhipped and taken by other vessels to their destination. This traffic attained large dimensions. In order to thwart it, United States vessels of war proceeded to capture and send in for condemnation neutral ships and cargoes ostensibly bound for neutral ports."[2] In the case of the *Kim* Sir Samuel Evans observed that the doctrine of the continuous voyage was applied and extended by the United States Courts against Great Britain in the time of the American Civil War and that its application was acceded to by the British Government and was acted upon by the International Commission which sat under the treaty made between Great Britain and America

1. (1806) 5 C. Rob. 385.

2. Hyde—International Law Vol. III p. 2123-2133.

at Washington on May 8, 1871.[1] This case laid down that "the doctrine of continuous voyage or transportation both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war in accordance with the principles of recognised legal decisions, and with the view of the great body of modern jurists, and also by the practice of nations in recent maritime warfare."

The leading case, however, on the doctrine of continuous transportation in relation to contraband is that of the *Peterhoff*.[2] In this case the vessel containing cargo of different types on a voyage from London to Matamoras in Mexico was captured. A part of the cargo which consisted of military articles whose evident destination was the Confederate States was condemned but the vessel and the non-contraband cargo were released on the ground that the neutral commerce with Matamoras except in contraband was entirely free. The Court was of opinion that the articles of absolute contraband were destined for Texas by way of Matamoras and were subject to condemnation. Another celebrated case in which the doctrine of continuous transportation was applied is that of the *Springbok*. The *Springbok* a vessel owned by a British subject during her voyage from London to Nassau was captured. The Court found that her papers which were genuine proved that she was bound for Nassau, and that her owner had no interest in the cargo. As for the cargo the Court was of opinion that the bills of lading were misleading and that they concealed the nature of the cargo with a view to escape capture. It was therefore held that "the cargo was originally shipped with intent to violate the blockade ; that the owners of the cargo intended that it should be transhipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok*, that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."[3]

The case of the *Bermuda*[4] is very significant. In this

1. The Kim (Probate Division) 215.
2. 5 Wall 28.
3. 5 Wallace 27, 28.
4. 3 Wall. 514.

case the vessel sailed under British flag from Liverpool. The vessel after staying at St. Georges in Bermuda for some time without transhipment of the cargo sailed towards Nassau. She was captured on her voyage on the ground that her cargo which was largely composed of munitions of war had been intended either directly or by transhipment to break the blockade of the southern ports and that both the vessel and the cargo were liable to be condemned. It was held by the Court that 'a transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transhipments intervened." In view of the fact that the ultimate destination of the cargo was hostile and there was strong evidence of the enemy ownership of the vessel both the cargo and the vessel were condemned. In the case of the *Stephen Hart* the Court held that if there is a guilty intention at the time of sailing that the goods should reach the enemy, that intention must be deemed to linger on even though there is stoppage at a neutral port on the way.[1]

This doctrine was approved of by Great Britain and was applied during the Boer War in the case of German ship *Bundesrath* which was captured on its way to a neutral port. Germany demanded the release of the vessel on the ground that it could not be held guilty of the carriage of contraband from one neutral port to another. The British Government maintained that although the vessel was bound for a neutral port the cargo had a hostile destination. This case pointed out the distinction between destination of the vessel and that of the cargo and gave the rule that the hostile destination of the cargo was material in justifying the application of the doctrine.

Some of the Continental States applied the doctrine of the continuous transportation. The Prussian Regulations of 1864 regarding Naval Prizes provided that the hostile destination of the goods or of the vessel carrying contraband was enough to render it liable to capture. In the case of the *Doelwijik* the Italian Prize Court applied the doctrine of continuous transportation when the vessel was bound for a neutral port but the cargo carried by it was intended to be for a hostile destination.

During the First World War this doctrine was applied by British Prize Courts even in cases when contraband goods had been intended after having undergone a process of manufacture

1. 3 Wallace 559.

at a neurral port to be transported from neutral port to a hostile port. This application was made in the case of *The Balto.*[1] Later on, the same court in the case of *Bonna* took the view that it would be contrary to International Law 'to hold that raw materials on their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country were subject to condemnation on the ground that the cousequence might, or even would necessarily, be that another article of a like kind and adopted for a like use would be exported by other citizens of the neutral country to the enemy."[2]

Seizure for carriage of contraband.—A vessel carrying contraband is liable to be captured by the warships of the belligerents. A vessel guilty of carrying contraband can be seized while *in delicto*, that is to say, while she is on her way to the destination of the cargo. After a vessel has deposited the contraband goods, she cannot be seized. The British and American practice is in favour of seizing vessels even after the coatraband goods had been deposited, if the vessels had carried false papers. The other countries follow the practice that a vessel cannot be seized on its return journey after she has deposited her goods. The vessel guilty of carrying contraband can only be seized while she is on the open sea or in the maritime belt of the belligerent. She cannot be seized in the neutral maritime belt.

The Declaration of London provides that a vessel carrying goods liable to be captured for carrying absolute or conditional contraband can be captured on the high sea or in the territorial waters of the belligerents throughout the whole of her voyage. Great Britain on enacting the Mritime Rights Order in Council of July 7, 1916 abandoned the Declaration. The Maritime Rights Order in Council provided that a "neutral vessel with papers indicating a neutral destination, which notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage." In the case of the *Alwina* it was held that a vessel which had been carrying contraband with false papers was not liable to capture if in the meantime she had abandoned the adventure, discharged the contraband cargo at the neutral port and sold and delivered it to other buyers.[3]

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1. The Balto (1917), p. 79.
2. (1918) p. 123.
3. (1918) A. C. 444.

Penalty for the carriage of contraband.—International Law recognises the right of a belligerent to capture the vessels carrying contraband. The right of capture by a belligerent can be exercised so long as the guilty neutral vessel is *in delicto*, that is to say, she has not deposited the contraband goods. It cannot be captured after she has deposited the contraband goods and is on her return voyage. According to British and American practice a vessel with false papers can be captured even on her return voyage but according to other States she is immune from capture on her return voyage in any case. The vessel can only be seized on the open sea or on the territorial waters of the belligerent and in no case she can be captured while on neutral waters.

In former times the penalty for the carriage of the contraband was the confiscation of the cargo and the vessel. With changing times modifications were made in this rule. It is now universally recognized that the contraband goods are liable to confiscation. But no unanimity exists with regard to the question as to whether the vessel and the innocent goods are to be confiscated. The British and American practice has been to confiscate the vessel (1) if the vessel and the contraband goods belonged to the same owner; or (2) in case the owner of the vessel was not the owner of the contraband if the vessel sailed with false papers or (3) if the vessel under a treaty with her flag State was bound not to carry contraband to the enemy and she was carrying contraband within the knowledge of the owner of the vessel. According to the British and American practice the innocent cargo is also liable to confiscation if the contraband and the innocent cargo belong to the same person. In the case of the *Hakan* the Privy Council held that "the knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship, at any rate where the goods in question constitute a substantial part of the whole cargo."[1]

The States which maintained a distinction between conditional and absolute contraband followed the practice of confiscating the conditional contraband and paying its price. Great Britain on confiscation of conditional contraband paid the freight of the vessel and the price of the goods plus an amount equal to ten percent of the price.

The Declaration of London provided that conditional and

1. (1918) A. C. 148.

absolute contraband was liable to confiscation and that the vessel carrying them was also liable to confiscation if the contraband reckoned either by value, weight, volume or freight formed more than half the cargo.

In case the contraband was of value not more than half the cargo the guilty vessel was liable to pay the costs incurred by the capturing vessel. The Declaration further provides that the innocent goods on the captured vessel are liable to confiscation in case they belonged to the same owner as the contraband goods.

CHAPTER LX

UNNEUTRAL SERVICE

Unneutral Service.—The term 'unneutral service' covers an offence analogous to that of the carriage of contraband and is used to distinguish between carriage of contraband and carriage of persons and despatches. Some writers use the expression "analogous of contraband," for the term 'unneutral service'. The unratified Declaration of London employed this form to cover various acts, *viz.*, the carriage of despatches and persons by neutral vessels, the transmission of intelligence in the interest of the enemy, participation of neutral vessel in actual hostilities, voluntary subjection of the neutral to the orders of the enemy Government and other similar acts rendering assistance to the enemy. *Holland* calls them 'enemy service' while French writers call them 'assistance hostile.'

According to *Starke* unneutral service implies 'various acts committed by neutral subjects amounting to material assistance to a belligerent for which the opposing belligerent may inflict penalties varying according to the act or acts.'[1] A neutral vessel engaged in carrying passengers who belong to the armed forces of a belligerent is punishable for unneutral service. Any service which is to the advantage of a belligerent and which is performed by a neutral will be unneutral and punishable. In exercising the right to prevent the enemy from benefiting from the aid rendered by a neutral ship a

1. J. G. Starke—An Introduction to International Law, p. 327.

belligerent engages in a towfold task—that of intercepting what is being carried and that also of penalising the carrier. It might be clear that the right of interception is not dependent on the knowledge or ignorance of persons controlling the vessel."[1]

It was the Declaration of London adopted by the Naval Conference of 1908 that made a clear statement of the law with regard to unneutral service. The customary law relating to this subject which existed before the Declaration was neither clear nor certain. The Declaration was followed by the Allies at the outbreak of the First World War but later on in 1916 it was abandoned. According to *Oppenheim* the present position of law of unneutral service is unsatisfactory.

Unneutral Service and Contraband Distinguished.— Although unneutral service is analogous to carriage of contraband it is not identical with it. Carriage of contraband is with respect to goods only while unneutral service consists in carrying of persons and despatches. Carriage of contraband and unneutral service differs essentially in character for while contraband may be carried as a matter of commerce and not as a matter of service of a belligerent, the unneutral service is the result of a direct service of the enemy. Hostile destination is necessary for carriage of contraband while it is not essential in the case of unneutral service.

"Thus hostile destination, proof of which plays so important a part in the treatment of contraband, need not always be shown to exist in order to justify interference with the carriage of enemy military persons ; for the right to intercept them may, in the particular case, rest upon the nature of their mission or service or upon their actual conduct while in transit."[1] The carriage of contraband is punished by confiscation of the objectionable cargo and in exceptional cases by condemnation of the vessel also ; but the penalty for unneutral service is condemnation of the vessel itself. The unneutral service consists in rendering distinct belligerent service while carriage of contraband consists in transporting goods for military use of the belligerent.

Kinds of Unneutral Service—Unneutral service takes different forms. The unneutral services for which a belligerent has a right to punish are :—

(1) Carriage of Persons.—A neutral vessel engaged in carrying persons for the enemy is guilty of rendering un-

1. Hyde—International Law, Vol. III, p. 2164.

neutral service. The persons carried must either be members of the armed forces of the enemy or those who are going to join the armed forces of the enemy or those who are not members of the armed forces but who are in the service of the enemy and who are likely to be made prisoners of war or who are engaged in advancing the cause of the enemy. An enemy official or head of the enemy State who in order to escape being captured as prisoner of war sails on board a neutral vessel destined for another country is a person the carriage of whom by a neutral vessel would be unneutral service. *Oppenheim* is of the opinion that a vessel would be guilty of unneutral service only when those incharge of the vessel knew of the character of the persons and carried them or when the vessel was directly hired by the enemy for the purpose of transporting the individuals concerned. The British practice is in favour of punishing neutral vessels for carrying persons for the enemy even if the vessel was *bona fide* ignorant of the character of the persons or if she was forced by the enemy to carry those persons. According to British practice the right of the belligerent to punish for unneutral service does not depend on the knowledge of the vessel about the character of the persons. In the case of the *Carolina* the plea that the vessel was forced to carry French troops from Egypt to Italy during war between England and France was not accepted and the vessel was condemned for rendering unneutral sevice.[1] Similarly, the American vessel *Orozembo* was captured and condemned during war between England and Netherlands inspite of the plea which had been substantiated that the master of the vessel was ignorant of the service of the enemy.[2] Again, in the case of the *Manonba* an Italian cruiser which stopped a French Vessel and got surrender of persons of Turkish nationality carried by it was held by the Hague Court of Arbitration to be within its rights on the ground that the persons carried by the French vessel belonged to the armed forces of Turkey.[3] The rule that emerges from these decisions is that want of knowledge or ignorance of the fact of enemy service or of the character of the persons carried constitutes no valid defence. It is the injurious service that counts in judging whether it is an unneutral service and in giving a right to a belligerent to prevent it from being rendered in future.

Tests for such unneutral service.—That a neutral vessel

1. 4 C. Rob, 256.
2. 6 C. Rob, 430.
3. Scott, Hague Court Reports, 341.

is carrying persons belonging to a belligerent is not enough to condemn it as being guilty of unneutral service. As already stated, that character of the persons carried is material. "On principle the right of a belligerent to intercept and exercise some measure of control over enemy persons on a neutral ship encountered on high seas should depend upon the connection between the individual and the public service of his country and also upon whether he is enroute for a belligerent service or to a hostile destination or is at the time engaging in a belligerent activity."[1] Whether International Law permits a belligerent to capture persons of enemy nationality on board a neutral vessel on the ground that these persons judged from their age and capacity are likely to be called for military service is one on which no unanimity among States exists. Great Britain and France during the First World War treated persons of enemy nationality or board neutral vessels bound for enemy port as being in the service of the enemy by reason of their age. Sir Edward Grey, the British Foreign Secretary, in 1916 declared that it was permissible for a belligerent to intercept on high seas not only members of armed forces of the enemy on board neutral ships but also those agents who were sent by the enemy abroad for purposes of war and those who were without being commissioned by the enemy advancing his war cause.

The case of the *China* is important on the point and may be noted. The American vessel *China* was stopped by the British Cruiser *Laurentic* and persons having German, Austrian and Turkish nationality on board the *China* were removed on the ground that the carriage of these persons constituted unneutral service. The American Government protested on the ground that the rule is definite that only military and naval persons could be removed from neutral vessels on high seas and that persons are not liable to be captured on the high seas regardless of whether they are in the military service of the enemy. While this controversy was going on the United States entered war with the result that the captured persons were released.

The case of *Asama Maru* gave rise to a sharp controversy between Japan and Great Britain on the right of a belligerent to capture persons on board neutral vessels on high seas. A British warship stopped a Japanese steamship, *Asama Maru* on its way from Honolulu to Yokohama and removed 21 Germans that were on board that vessel. The Japanese Government protested and the British Government contended that the

1. Hyde—International Law, Vol. III, p. 2167.

removed persons were merchant seamen whom the German Government wanted for service in its navy. The British Government further declared that some of the captured persons were unfit for military service and it was proposed to release them. It was maintained by Great Britain that other captured persons by reason of their age and capacity were fit for service in the German navy and they could not be released. In the end 9 out of 21 persons were released.

Exception.—The rule of carrying persons in the service of the enemy is not without an exception. The customary International Law permitted the carriage of diplomatic agents by neutral vessels to neutral territory. This exception is supported by the authority of the case of the *Trent.*[1] On November 8, 1861 *Trent* a British mail contract packet was on its way from Habana to a British port. She was stopped and was compelled by U.S.S. *San Jacinto* to give up Messrs. Mason and Slidell with their two secretaries. Messrs. Mason & Slidell had been sent as political agents by the Confederate States to Great Britain and France. Great Britain demanded their release on the ground that the act was an "affront to the British Flag and a violation of International Law." The British Government contended that the carriage of Messrs. Mason and Slidell who were political agents was not in violation of the duties of neutrality on the part of the vessel *Trent.* The law of contraband was held inapplicable to this case and Messrs. Mason and Slidell were "cheerfully liberated." The representative character of these persons placed them out side the scope of the rule.

2. Transmission of intelligence to the enemy.—It is unneutral service if a neutral merchant vessel is engaged in transmitting intelligence to the enemy. A belligerent has a right to punish such neutral vessel. A neutral vessel carrying despatches and in particular despatches relating to war from or to the enemy is guilty of performing unneutral service and is punishable by a belligerent. "Doubtless a belligerent possesses the right to intercept enemy despatches being carried by a neutral ship, and purporting to relate to the conduct of war."[2]

It may however be noted that a neutral ship carrying despatchés or transmitting intelligence from enemy to neutral Governments and from neutral Governments to the enemy

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1. Hyde—International Law, Vol. III, p. 2164,
2. Hyde—International Law, Vol. III, p 2173.

is not punishable for unneutral service. A neutral State has a right to demand that there should be no interference with its intercourse with either belligerent. A neutral vessel is also permitted to carry despatches from enemy Government to its diplomatic agênts or consuls stationed on neutral territory. Postal correspondence also enjoys inviolability and vessel carrying postal correspondence of whatever character is not punishable for unnuetral service.

According to *Oppenheim* a neutral vessel in order that it may be held guilty for uñneutral service in carrying despatches must be proved that she knew of the character of the despatches and nevertheless took them on board or that she was directly hired for the purpose of carrying them. The British practice is however not uniform. *Holland* and *Phillimore* maintained that ignorance about the character of despatches on the part of the vessel is no defence. The case of the *Rapid* arose during war between Great Britain and Netherlands. The *Rapid*, a vessel which was carrying a despatch for the Cabinet Minister of Netherlands hidden in a cover addressed to a merchant, was captured but the Prize Court released it.[1] In another case the *Atlanta* was found guilty of carrying despatches hidden in a tea chest and was condemned.[2]

The transmission of intelligence may be communication of oral intelligence or may be carriage of despatches. The transmission of intelligence of value to the enemy will amount to unneutral service. A neutral vessel engaged in transmitting intelligence to the enemy is punishable. In the case of the *Iro-Maru* a vessel belonging to an Allied subject carrying an agent of the enemy with important despatches was condemned.

Penalty for unneutral service.—A neutral vessel engaged in carrying enemy persons and guilty of unneutral service is liable to be confiscated. The British practice is in favour of confiscating cargo belonging to the owner of the vessel guilty of unneutral service. The persons removed are liable to be made prisoners of war. The carriage of enemy persons may justify condemnation of the vessel but the belligerent capturing it may only be satisfied by making the captured persons prisoners of war without condemnation of the vessel.

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1. (1810) Edwards, 228.
2. (1808) 6 C. Rob, 440.

A neutral vessel engaged in the transmission of intelligence by carrying despatches to the enemy is also liable to condemnation. The despatches are liable to be taken by the capturing belligerent. According to British and American practice the persons and despatches carried by the neutral vessel are not liable to confiscation unless the vessel itself is not confiscated. If the vessel is also carrying cargo besides being engaged in unneutral service, the cargo is liable to confiscation only if the owner of the cargo participates and connives at the unneutral service.

Unneutral service under the Declaration of London.— It is unfortunate that the Declaration of London which laid down the law relating to unneutral service has so far remained unratified and unaccepted. It would appear that the customary law relating to unneutral service is in many respects uncertain and unsettled and it is worthwhile to have in mind the important provisions of the Declaration.

The Declaration provides that a neutral vessel is liable to condemnation if she was on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy or with a view to transmission of intelligence in the interest of the enemy. It further provides for condemnation if the vessel to the knowledge of either the owner, charterer or the master, is transporting a military detachment of the enemy, or one or more persons who in the course of the voyage directly assist the operations of the enemy. The Declaration states that in the cases specified above goods belonging to the owner of the ship are also liable to condemnation.

The Declaration of London makes neutral vessel carrying despatches to the enemy punishable. It provides that a neutral vessel might be seized for transmitting intelligence to the enemy if she is on a voyage undertaken for such transmission. The Declaration also provides that a neutral vessel takes an enemy charactetr if it takes direct part in the hostilities, if it is placed under the control of an agent placed on board by the enemy Government, if it is in the exclusive employment of the enemy Government, or if it is exclusively engaged in transporting enemy troops or in transmitting intelligence to the enemy.

The penalty provided for in the Declaration is the confiscation of the guilty vessel and also of that cargo which belongs to the owner of the vessel. There is a further provision that even if the vessel is not liable to be confiscated, the members of armed forces of the enemy who happen to be on board the

vessel are to be made prisoners of war. The vessels rendering any of the above kinds of unneutral service meet the same treatment as vessels carrying contraband. Neutral vessels as they acquire enemy character receive the same treatment as the enemy vessel.

CHAPTER LXI

VISIT AND SEARCH

Nature of the Right of Visit and Search.—International Law concedes to every belligerent the right to visit and search neutral vessels for the purpose of ascertaining the character of the vessel and its cargo. This right of visit and search is incidental to the right of capture which the belligerents possess. In the case of the *Nereide* it was held that the right of visit and search is a right growing out of and ancillary to the greater right of capture.[1] According to *Oppenheim* the right of visit and search is not an independent right but is involved in the right of either belligerent to punish neutral vessels, breaking blockade, carrying contraband and rendering unneutral service. "In theory the object of visit and search is to place information, chiefly concerning neutral ships, within the reach of the belligerent whose warships encounter them in order that it may exercise the full measure of its rights as such in the light of information that may thus be disclosed."[2] In the case of *The Maria* Sir William Scott observed : "The right of visiting and searching merchantships upon high seas, whatever, be the ships, whatever be the cargoes, whatever be the destination is an incontestible right of the lawfully commissioned cruisers of a belligerent nation."[3]

The right of visit and search can be exercised during a war by warships and military aircrafts. A neutral vessel can be visited and searched while it is on the open sea or in the territorial waters of either belligerents. The right cannot be exercised while the vessel is in neutral waters. Neutral men-of-war or other public vessels are not subject to the right of visit and search. Private neutral vessels can be visited and searched.

1. 9 Cranch, 338.
2. Hyde—International Law, Vol. III, p. 1959.
3. The Maria.—(1799), C. Rob. 340.

Right of Convoy.—This right is claimed by neutral vessels which are escorted by neutral men-of-war and consists in demanding immunity from visit and search for vessels sailing under the convoy of the men-of-war. In 1653 Sweden during war between Great Britain and Netherlands for the first time claimed this right and asked the belligerents not to visit and search its vessels sailing under the convoy of Swedish men-of-war in case the commander of the men-of-war assured that there were no contraband on board the vessel. In later wars this right was claimed by other continental neutral States. Great Britain did not recognise the right of convoy and during the First World War it refused to abstain from visiting and searching Dutch neutral vessels sailing under convoy.

According to American practice a neutral vessel sailing under a convoy is immune from visit and search by a belligerent. "A neutral merchantman under convoy of a vessel of war of its own nationality is at present time deemed to be exempt from search, because a belligerent cruiser is believed to be able to find in the word of the commander of the convoy as full an assurance as would be afforded by the exercise of visit and search itself, and also for the reason that the presence of the convoying ship is not necessarily indication of a design to oppose force by force."[1]

The unratified Declaration of London provided that neutral vessels sailing under neutral convoy were not liable to visit and search if the commander gave in writing all information as to the character of the convoyed vessel and of the cargo It further laid down that in case it appeared to the belligerent commander that the information given by the commander of the convoy was not correct, the belligerent commander was to ask the commander of convoy to investigate further with regard to the character of the vessel and of the cargo and to give him a report. The commander of the convoy was authorised to withdraw its protection from the convoyed vessel in case he found that his report was such as justified capture.

Belligerent convoy.—The so-called right of convoy stated above implies that neutral vessel is escorted by a neutral warship and is not applicable to cases where neutral vessels sail under the belligerent convoy. That a neutral vessel is sailing under a belligerent convoy is enough to show that there will be resistance to visit and search. "It is believed

1. Hyde—International Law, Vol. III, p. 1986,

that the acceptance by a neutral vessel of the convoying aid by a belligerent vessel of war affords good ground for the condemnation of the former, because that acceptance marks a preparedness and an expectant effort to prevent or ward off acts on the part of the opposing belligerent which are legitimate and should not be opposed by or on behalf of the neutral as well as the readiness to resist by force, if occasion arises, the endeavour of that belligerent to examine the vessel by visit and search or to bring it in for adjudication."[1] A neutral vessel under the convoy of a belligerent man-of-war is guilty and is liable to condemnation.

Mode of Visit.—The mode in which visit is made by a belligerent warship is regulated by the laws of the visiting State and the rules of International Law are silent on the point. The vessel sought to be visited is asked to stop by belligerent man-of-war hailing or by firing one or two blank cartridges or if necessary by firing a shot across the bows of the vessel. After the vessel is stopped, one or two officers of the man-of-war go on board the vessel sought to be visited and they then inspect the relevant ship's papers to ascertain the destination of the vessel, the character of the vessel and of the cargo. If on an inspection it appears that the vessel is innocent, she is allowed to continue her voyage. If, on the other hand, it appears that the vessel is carrying contraband or is engaged in unneutral service or is for any other reason liable to capture it is captured. The fact of the visit is then noted in the log-book of the ship.

The Right of Search.—The right of search is exercised only when the ship's papers do not conclusively show that the vessel is innocent. "If the papers do not furnish conclusive evidence of the innocent character of the vessel, the cargo and voyage, or probable cause for capture the boarding officer shall continue the examination by questioning the personnel or by searching the vessel or by examining her cargo. If such further examination furnishes satisfactory evidence of innocency, the vessel shall be released ; otherwise she shall be seized and sent in for adjudication."[2] The right of search is exercised only to remove suspicions about the innocence of the neutral vessel. The belligerent man-of-war in the exercise of the right of search is not entitled to detain the vessel for a longer time than is necessary or to capture it on insufficient reasons. The right of search must not be exceeded. "The process of mere

1. Hyde—International Law, Vol. III, p. 1988.
2. Hyde—International Law. Vol. III, pp. 1963-1964.

investigation should never take the .form of chastisement."[1] The case of the *Carthage* lays down the limitations of the right of search. *Carthage,* a French mail steamer was stopped on her voyage from Marseilles to Tunis during Turko-Italian War by an Italian destroyer. On an inspection it was found that *Carthage* had on its board an aeroplane belonging to a French aviator. The aeroplane was considered to be contraband and the *Carthage* was taken to a port and was detained for about a fortnight. The court laid down the principle that "the legality of every act which goes beyond a mere search depends upon the existence either of a trade in contraband or of sufficient reasons to believe that such a trade exists ; as in this respect the reasons must be of juridical nature."[2] In as much as there existed no juridical reasons to hold that the aeroplane was contraband, the capture of the vessel was held to be unjustified.

Visit and Search of Mail Steamers.—The Hague Convention of 1907 declared that a mail ship should not be searched except when absolutely necessary. The parctice of the United States has been since long not to search mail steamers except on clear grounds of suspicion that the mail steamers are carrying contraband or attempting to commit a breach of the blockade. Great Britain did not during the two World Wars accept the principle that mail steamers were totally immune from visit and search. The position taken by it was that it had, as a belligerent, a right to make a visit and search the mail steamers for the purpose of finding out whether they contained contraband and also a right of censorship over the mail. On protests made by the United States during the First World War, Great Britain maintained that there was no rule prohibiting belligerents from exercising on open sea "as to postal correspondence, the right of supervision, surveillance, visitation and if need be, seizure and confiscation which International Law confers upon them in the matter of any freight outside of the territorial waters and jurisdiction of the neutral powers." In the Second World War Great Britain asserted that a belligerent was at liberty to examine mail bag and if necessary their contents in order to assure itself that they did not cantain any contraband.

Resistance of visit and search.—Resistance offered by the vessel sought to be visited and searched leads to dire con-

1. Hyde—International Law, Vol. III, p. 1964
1. J. B. Scott, Hague Court Reports, 329, 334.

sequences A belligerent man-of-war when resisted in the exercise of its right of visit and search is entitled to employ force and attack the vessel. The vessel which resists is not after capture subjected to visit or search. If the vessel during such an attack is damaged or sunk, there can arise no cause for complaint. In case of resistance the vessel is liable to be captured and confiscated According to British and American practice the resisting vessel and also its cargo are to be confiscated. The continental practice however is in favour of confiscating only the vessel.

Whether or not there has been a resistance sufficient to render the vessel liable to confiscation is always important. In the case of the *Porto Said*, an Italian vessel, an attempt to escape and to ram an Austro-Hungarian submarine was considered to be sufficient to condemn the vessel. In the case of the *St. Juan Baptista* and *La Purrissima Conception* the British Prize Court held that a mere attempt to escape did not constitute resistance sufficient to render the vessel to condemnation.[1] Resistance to be penal may not be forcible in the sense that the vessel sought to be visited and searched may employ force to evade visit and search but it may be such as may clearly indicate that the vessel has taken some step to avoid visit and search by belligerent man-of-war. In the case of the *Indo-Chinois* an attempt to scuttle the ship was held sufficient for her condemnation. In the case of the *Maria*, a Swedish vessel sailing under a Swedish convoy was during war between Great Britain and France sought to be visited and searched by a British squadron. Forcible resistance was offered by the convoy and the Swedish vessel was captured. The British Prize Court gave the verdict of condemnation. *Sir William Scott (Lord Stowell)* in this memorable case in delivering the judgment of the High court of Admiralty lays down the three following principles of law relating to the right of visit and search and the consequences of resistance :—

(1) That the right of a belligerent to vist and search merchant-ships in the high seas is an incontestable right. "I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who

1. (1803) 5 C. Rob; 33.

admits the right of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods* must admit the exercise of this right, at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges."

(2) That the authority of the neutral sovereign being forcibly interposed cannot take away the right of belligerent man-of-war of right of visit and search. "Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this independently of all special covenants, is the right of personal visitation and search, to be exercised by those who have the interest in making it."

(3) That the penalty for resistance of visit and search is the confiscation of the vessel. "But I stand with confidence upon all principles of reason,—upon the distinct authority of Vattel,—upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down that, by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation."

PART V

U. N. CHARTER
GENEVA CONVENTIONS
HAGUE CONFERENCES
and
LEADING CASES

TEXT OF THE UNITED NATIONS CHARTER

We the Peoples of the United Nations Determined

—to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

—to reaffirm faith in fundamental human rights, in the dignity and wortk of the human person, in the equal rights of men and women of nations large and small, and

—to establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained, and

—to promote social progress and better standards of life in larger freedom.

And for these ends

—to practice tolerance and live together in peace with one another as good neighbours, and

—to unite our strength to maintain international peace and security, and

—to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used save in the common interest, and

—to employ international machinery for the promotion of economic and social advancement of all peoples.

Have resolved to combine our efforts to accomplish these aims.

Accordingly, our respective governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due from, have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.

CHAPTER I—PURPOSES AND PRINCIPLES

Article 1.—The purposes of the United Nations are :

1. To maintain international peace and security, and to that end : to take effective collective measures for the preven-

tion and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and International Law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace ;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace ;

3. To achieve international cooperation in solving international problems of an economic, social, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ; and

4. To be a centre for harmonising the actions of nations in the attainment of these common ends.

Article 2. The Organisation and its members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles.

1. The Organisation is based on the principle of the sovereign equality of all its members.

2. All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

5. All members shall give the United Nations every assistance in any action it takes in accordance with the Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

6. The organisation shall ensure that States which are not members of the United Nations act in accordance with these

principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter ; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II—MEMBERSHIP

Article 3.—The original members of the United Nations shall be the States which having participated in the United Nations Conference on International Organisation at San Francisco or having previously signed the Declaration by United Nations of January 1, 1942, signed the present Charter and ratify it in accordance with Aritlcle 110.

Article 4.—1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and in the judgment of Organisation, are able and willing to carry out these obligations.

2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the reccommendation of the Security Council.

Article 5.—A member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6.—A member of the United Nations which has presistently violated the principles contained in the present Charter may be expelled from the organisation by the General Assembly upon the recomendation of the Security Council.

CHAPTER III—ORGANS

Article 7.—1. There are established as the principal organs of the United Nations : a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, and International Court of Justice, and a Secertariat.

2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8.—The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV—THE GENERAL ASSEMBLY

Composition

Article 9.—1. General Assembly shall consist of all the members of the United Nations.

2. Each member shall have not more than five representatives in the General Assembly.

Functions and Powers

Article 10.—The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11.—1. The General Assembly may consider the General principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regarded to such principles to the members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of International peace and security brought before it by any member of the United Nations, or by the Security Council or by a State which is not a member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendaiions with regard to any such questions to the State or States concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12.—1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13.—1. The General Assembly shall initiate studies and make recommendations for the purpose of :

A. Promoting international cooperation in the political field and encouraging the progressive development of International Law and its codification ;

B. Promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph I (B) above are set forth in Chapter IX and X.

Article 14.—Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions to the present Charter setting forth the purposes and principles of the United Nations.

Article 15.—1. The General Assembly shall receive and consider annual and special reports from the Security Council ; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16.—1. The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapter XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17.—1. The General Assembly shall consider and approve the budget of the Organisation.

2. The expenses of the Organisation shall be borne by the members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialised agencies referred to in Article 57 and shall examine the administrative budgets of such specialised agencies with a view to making recommendations to the agencies concerned.

Voting

Article 18.—1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph I (C) of Article 86, the admission of the members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19.—A member of the United Nations which is in arrears in the payment of its financial contributions to the organisation shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

Procedure

Article 20.—The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may

require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the members of the United Nations.

Article 21.—The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

Article 22.—The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

CHAPTER V—THE SECURITY COUNCIL

Composition

Article 23.—1. The Security Council shall consist of eleven members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect six other members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organisation, and also to equitable geographical distribution.

2. The non-permanent members of the Security Couucil shall be elected for a term of two years. In the first election of the non-permanent members, however, three shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

Functions and Powers

Article 24—1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging the duties the Security Council shall act in accordance with the purposes and principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25—The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26.—In order to promote the establishment and maintenance of international peace and security with the least diversion for arguments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the members of the United Nations for the establishment of system for the regulation of armaments.

Voting

Article 27.—1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Procedure

Article 28,—1. The Security Council shall be so organised as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organisation.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the organisation as its judgment will best facilitate its work.

Article 29.—The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 30.—The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

Article 31.—Any member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that member are specially affected.

Article 32.—Any member of the United Nations which is not a member of the Security Council or any State which is not a member of the United Nations if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a State which is not a member of the United Nations.

CHAPTER VI—PACIFIC SETTLEMENT OF DISPUTES

Article 33.—The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34.—The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35.—1. Any member of the United Nations may bring any dispute or any situation of the nature referred to in Article 34 to the attention of the Security Council or of the General Assembly.

2. A State which is not a member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this article will be subject to the provisions of Articles 11 and 12.

Article 36.—1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a sitution of like nature, recommened appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3 In making recommendations under this article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37.—1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38—Without prejudice to the provisions of Articles 33—37 the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII—ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39.—The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40.—In order to prevent an aggravation of the situation, the Security Council, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41.—The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of Communication and the severance of diplomatic relations.

Article 42.—Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstration, blockade, and other operations by air, sea, or land forces of members of the United Nations.

Article 43.—1. All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council on its call and in accordance with a social agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

9. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3 The agreement or agreements shall be negotiated as soon as possible on the initiative of the security Council. They shall be concluded between the Security Council and members or between the Security Council and groups of members and snall be subject to ratification by the signatory states in accordance with their respective constitutional process.

Article 44.—When the Security Council has decided to use force it shall, before calling upon a member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that member, if the member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that member's armed forces.

Article 45.—In order to enable the United Nations to take urgent military measures, members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of

readiness of these contingents and plan for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46.—Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47.—Their shall be established a Military Staff Committee to advice and assist the Security .Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the Strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Mililitary Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

Article 48.—1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49.—The members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50.—If preventive or enforcement measures against any state are taken by the Security Council, any other State, whether a member of the United Nations or not, which finds itself confronted with special enonomic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51.—Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII—REGIONAL ARRANGEMENTS

Article 52.—1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.

2. The members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

Article 53.—1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security

Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the organisation may, on request of the governments concerned, be charged with the responsibility for preventing further aggression by such a State.

2. The term enemy State as used in paragraph 1 of this article applies to any State which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54.—The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX—INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

Article 55.—With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote :

A. Higher standards of living, full employment, and conditions of economic and social progress and development ;

B. Solutions of international economic, social health, and related problems ; and international cultural and educational cooperation ; and

C. Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56.—All members pledge themselves to take joint and separate action tn cooperation with the Organisation for the achievement of the purposes set forth in Article 55.

Article 57.—1. The various specialised agencies, established by inter-governmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialised agencies.

Article 58.—The organisation shall make recommendations for the coordination of the policies and activities of the specialised agencies.

Article 59.—The organisation shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialised agencies required for the accomplishment of the purposes set forth in Article 55.

Article 60.—Responsibility for the discharge of the functions of Organisation set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

CHAPTER X—THE ECONOMIC AND SOCIAL COUNCIL

Article 61.—1. The Economic and Social Council shall consist af eighteen members of the Uuited Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, six members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election, eighteen members of the Economic and Social Council shall be chosen. The term of office of six members so chosen shall expire at the end of one year, and of six other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

Functions and Powers

Article 62.—1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the members of the United Nations, and to the specialised agencies concerned.

2. It may make reocmmendations for the purpose of

promoting respect for, and observance of, human rights and fundamental freedom for all.

3. It may prepare draft convention for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conference on matters falling within its competence.

Artile 63.—1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may coordinate the activities of the specialised agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the members of the United Nations.

Article 64.—1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialised agencies. It may make arrangements with the members of the United Nations and with the specialised agencies to obtain reports of the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65.—The Economic and Social Council may furnish information to the Security Council and shall assists the Security Council upon its request.

Article 66—1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of members of the United Nations and at the request of specialised agencies.

It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

Voting.

Article 67.—1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

Procedure.

Article 68.—The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commisions as may be required for the performance of its functions.

Article 69.—The Economic and Social Council shall invite any member of the United Nations to participate, without vote, in its delibrations on any matter of particular concern to that member.

Article 70.—The Economic and Social Council may make arrangements for representatives of the specialised agencies to participate, withont vote, in its delibrations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialised agencies.

Article 71.—The Economic and Social Council may make suitable arrangements for consulation with non-governmental organizations which are cocerned with matters within its competence. Such arrangements may be made with international organisations and, where appropriate, with national organisations after consultation with the member of the United Nations concerned.

Article 72-—1. The Econocic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meeting on the request of a majority of its members.

CHAPTER XI—DECLARATION REGARDING NON-SELF GOVERNING TERRITORIES

Article 73.—Mmebers of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the

inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present charter, the well-being of the inhabitants of these territories, and, to this end :

A. To ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses.

B. To develop self government, to take due account of the political aspirations of the peoples, and assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

C. To further international peace and security.

D. To promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialised international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article ; and

E. To transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapter XII and XIII apply.

Article 74.—Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas must be based on the general principle on good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

CHAPTER XII—INTERNATIONAL TRUSTEESHIP SYSTEM

Article 75.—The United Nations shall establish under its authority an international trusteeship system for adminisration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76.—The basic objectives of the trusteeship system, in accordance with the purposes of the United Nations laid down in Article 1 of the present Charter, shall be :

A. To further international peace and security ;

B. To promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towadrs self-government or independence as may be appropriate to the particular circumstances of such territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement ;

C. To encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world ; and

D. To ensure equal treatment in social, economic, and commercial matters of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77.—1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreemet :

A. Territories now held under mandate ;

B. Territories which may be detached from enemy States as a result of the Second War ; and

C. Territories voluntarily placed under the system by States responsible for their administration.

2. It will be a matter of subsequent agreemet as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78.—The trusteeship system shall not apply to territories which have become members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79.—The terms of trusteeship system, including any alteration or amendment, shall be agreed upon by the States directly concerned, including the mandatory power in the case of territories held under mandate by a member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Artiole 80.—1. Eccept as may be agreed upon in indvidual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this chapter shall be construed in or of itself to alter or in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties.

2. Paragraph I of this Article shall not be interpreted as giving grounds for delay or postponment for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Articls 81.—The trusteeship agreement shall in each case include the terms under which trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more States or the Organization itself.

Article 82.—There may be desinated, in the trusteeship agreement, a strategic area or areas, which may include part or all of the trust territory to which the agreement applies without prejudice to any special agreement or agreements, made under Article 43.

Article 83.—1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alterations or amendment shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considetations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

Artiele 84.—It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the adminsitering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local

defence and the maintenance of law and order within the trust territory.

Article 85.—1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the anthority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XIII--THE TRUSTEESHIP COUNCIL.

Composition

Article 86.—1. The Trusteeship Council shall consist of the following members of the United Nations :

A. Those members administering trust territories ;

B. Such of those members mentioned by name in Article 23 as are not administering trust territories ; and

C. As many other members elected for three years terms by the General Assembly as may be necessary to ensure that total number of members of the Trusteeship Council is equally divided between those members of the United Nations which administer trust territories and those which do not.

2. Each member of Trusteeship Council shall designate one specially qualified person to represent it therein.

Functions and Powers

Article 87.—The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may :

A. Consider reports submitted by the administering authority :

B. Accept petitions and examine them in consultation with the administering authority ;

C. Provide for periodic visits to the respective trust territories at times agreed upon with the administering authority ; and

D. Take these and other actions in conformity with the terms of the trusteeship agrements.

Article 88.—The Trusteeship Counciil shall formulate a questionnaire on the political, economic, social and educational

advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General assembly shall make an annual report to the General Assembly upon the basis of such a questionnaire.

Voting

Article 89.—1. Each member of the Trusteeship Council shall have one vote.

2. Decisons of the Trusteeship Council. shall be made by a majority of the members present and voting.

Procedure

Article 90.—1. The Trusteeship Council shall adopt its own rules and procedure, including the method of selecting its President.

2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Article 91.—The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialised agencies in regard to matters with which they are respectively concerned.

CHAPTER XIV—THE INTERNATIONAL COURT OF JUSTICE

Article 92.—The International Court of Justice shall be the principle judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93—1. All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

2. A State which is not a member of the United Nations may beome a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assemby upon the recommendation of the Security Council.

Article 94.—1. Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a ease fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgmment.

Article 95.—Nothing in the present Charter shall preven members of the United Nations from entrusting the solution of their differcences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96.—1. The General Assembly or the Security Council may request the Interuational Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

CHAPTER XV—THE SECRETARIAT

Article 97.—The Secretariat shall comprise a Secretary-General and such staff as the Organisation may require. The Secrety-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organisation.

Article 98 —The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-Gegeral shall make an annual report to the General Assembly on the work of the Organisation.

Article 99.—The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100.—In the performance of their duties the Secretary-General and the staff shall not seek or receive instruction from any goverment or from any other authority external to the Organisation. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organisations.

2. Each members of the United Nations undertakes to respect the exclusive international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101.—1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, and as required, to other organs, of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

CHAPTER XVI.—MISCELLANEOUS PROVISIONS

Article 102.—1. Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph I of this Article may invoke that treaty or agreement before any organ of the United Nations.

Article 103.—In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 104.—The Organ isation shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its funtions and the fulfilment of its purposes.

Article 105.—1. The Organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the members of the United Nations for this purpose.

CHAPTER XVII.—TRANSITIONAL SECURITY ARRANGEMENTS

Articls 106.—Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other members of the United Nations with a view to such joint action on behalf of the Organisation as may be necessary for the purpose of maintaining international peace and security.

Article 107.—Nothing inthe present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorised as a result of that war by the governments having responsibility for such action.

CHAPTER XVIII.—AMENDMENTS

Article 108.—Amendments to the present Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the members of the United Nations, including all the permanent members of the Security Council.

Article 109.—1. A general conference of the members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional

processes by two-thirds of the members of the United Nations including all the permanent members of the Security Coucil.

3. If Such a conference has not been held before the tenth annual sessson of the General Assembly following the comming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

CHAPTER XIX—RATIFICATION AND SIGNATURE

Article 110.—1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory States of each deposit as well as the Secretary-General of the Organisation when he has been appointed.

3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory States. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory States.

4. The States signatory to the present Charter which ratify it after it has come into force will become original members of the United Nations on the date of the deposit of their respective ratifications.

Article 111.—The present Charter, of which the Chinese, Freneh, Russian, Fnglish and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that government to the governments of the other signatory States.

In faith whereof—the representatives of the Gorvernments of the United Nations have signed the present Charter.

Done at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

THE GENEVA CONVENTIONS OF 1949.

History of Geneva Conventions.—A desire on the part of nations to minimize to the utmost the suffering and the horors of war which in olden times was considered to be a necessary evil appeared in the early stages of the development of the Law of Nations. This desire exhibited itself in a number of treaties concluded between States to regulate on humanitarian lines the actual warfare among them and to bring about a human touch on the battle-field. The first great attempt to bring about formulation of rules far the purpose of mitigating the inevitable sufferings of war was made by Jean Henry Dunart who saw with his own eyes the battle of Salferino in 1859 and the inhuman treatment to the wounded and the sick on the battle field. He published pamphlets of his own experience and advocated the cause of the wounded and the sick. He was able to bring about a favourable international atmosphere with the result that in 1864 the Government of the Federal State of Switzerland invited many European and American States to meet at a Conference at Geneva for the purpose of arriving at an international treaty embodying rules regarding the wounded on the battle-field. Twelve States met at a Conference in 1864 at Geneva and arrived at a Convention for the Amelioration of the condition of soldiers wounded in Armies in the field which was signed on August 22, 1864.

The ground covered by the Geneva Convention of 1864 was not considered sufficient by the First Hague Conference of 1899 which expressed a wish for its revision. A second Conference met in 1906 and it was attended by the representatives of thirty-five States. The result of these deliberations was that a new Geneva Convention was signed on July 6, 1909. The horors of the First World War made it necessary for the nations to meet again to discuss the possibility of mitigating still further the sufferings of war and ameliorating the condition of prisoners of war. Again, a Conference met at Geneva on July 1, 1929 and thirty three States signed a

Convention for the amelioration of the condition of the wounded and the sick in armies in the field.

All that was done hitherto in this matter was found insufficient at the close of the Second World War and States became anxious to restate, enlarge and clarify the rules of the previous Convention. This effort ended in a Conference which met at Geneva in 1949. Four Conventions were signed at Geneva on August 12, 1949.

Geneva Conventions of 1949.—The experience gained in the Second World War which ended in 1945 made the revision of the earlier Geneva Conventions necessary. Moreover, the dignity of the individual human being emphasized by the United Nations Charter called for better rules of general International Law regarding the treatment of the wounded, the sick, the ship wrecked, the prisoners of war and the ordinary man during war. The earlier Geneva Conventions were found deficient in many respects and it appeared necessary that they should be revised, improved and enlarged. This task of revision of the earlier Geneva Conventions and of formulating up new rules consistent with the dignity of mankind was taken by the International Committee of the Red Cross after the close of the Second World War. This International Committee invited experts from various countries to prepare a revised and new Convention When the first drafts prepared by the experts were ready the International Committee of the Red Cross convened a Conference in July and August 1946. This Conference made a thorough study of all the problems and collected full data. Thereafter in April 1947 a Conference of Government Experts for the study of Coventions for the protection of war victims was held in Geneva. Seventy representatives of fifteen States which had detained war prisoners and interned civilian people during the last war held deliberations. Drafts of the new Conventions were prepared. The International Committee af the Red Cross sought advice of several Governments which were not hither to been represented on the Conference of the Experts. The drafts after necessary amendments were sent to all Governments and National Red Cross Societies for the purpose of holding the 17th International Red Cross Conference. The International Red Cross Conference met in Augut 1948 and was attended by the representatives of fifty Governments and fifty two National Red Cross Societies. The draft of the Conventions were with few amendments adopted.

The Diplomatic Conference for the establishment of In-

enemy would be regarded as prisoner of war and would be entitled to all those rights which International Law concedes to prisoners of war.

Article 15.—Search.—An obligation has been imposed on parties to the conflict to take at all times and particularly after an agreement, measures without delay, to search for and collect the wounded and sick, to protect them against pillage and ill treatment, to ensure their adequate care and to search for the dead and prevent their deportation.

The parties to the confiict are required to arrange for armistice or suspension of fire to to enable removal, exchange and transportation of the wounded left on the battle field. Local arrangements for these purposes are also permitted.

Article 16.—Recording or Forwarding information.—This Article requires the parties to the conflict to make a record of all the wounded or sick belonging to the adverse party and falling into their hands with necessary particulars which may assist in their identification.

Information of the record made in respect of the wounded and sick shall be forwarded to the Information Bureau established under the provisions of Article 122 of the Third Geneva Convention of 1949. This Bureau is to transmit through the Protecting Power and the Central Prisoners of War Agency the information received by it to the Power to whom the wounded and sick belong.

The Parties to the conflict have to prepare and forward through the Information Bureau certificates of heath or duly authenticated list of the dead to each other. They shall likewise collect and forward through the same Bureau one half of a double identity disc, last wills or other documents of importance to the next of the kin, money and in general all articles of an intrinsic or sentimental value which are found on the dead.

Article 17.—Burial and Cremation.—The Parties to the conflict are charged with the duty of burying or cremating the dead individually as far as possible and of ensuring that an examination preferably a medical examination had previous to burial or cremation been made with a view to confirming death, establishing identity and enabling a report to be made.

Cremation of dead bodies shall be allowed only for imperative reasons or for motive based on religion of the deceased. The death certificate or the authenticated list of the dead

shall contain reasons and circumstances for which cremation was made.

The dead are to be honourably interred, if possible according to the religion which they followed and their graves are to be respected and distinctly marked.

Article 19.—Medical Units and Establishments.—Art. 19 provides that fixed establishment and mobile medical units shall not be attacked but shall be respected and protected by the parties to the conflict. Even if they fall into adverse hands their personnel shall be free to pursue their duties as long as the Capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units. These medical units are to be located at a safe place.

Article 20.—Hospital ships shall not be attacked from land.

Article 21.—Fixed establishments and mobile medical units will not be entitled to protection if they are used to commit, outside their humanitarian activities, acts harmful to the enemy. They will be given warning first and if the warning remains unheeded they will lose their privileged position under the Convention.

Article 22.—The fixed establishments and mobile medical units are not to lose protection guaranteed by Art. 19 if (*i*) their personnel is armed and they use arms in their own defence or in the defence of the wounded and sick in their charge, (*ii*) they are protected by a picket or, by sentries or by an escort, (*iii*) they are found in possession of small arms and ammunition which they took from the wounded and sick and which they could not hand over to the proper service, (*iv*) they are found in control of the personnel and material of the veterinary service, (*v*) they carry on humanitarian activities in respect of the civilian wounded and sick.

Article 24.—Respect and protection in all circumstances is guaranteed to medical personnel exclusively engaged in the search for or the collection, transport or treatment of the wounded or sick or in the prevention of disease, to staff exclusively engaged in the administration of medical units and establishments and to chaplains attached to armed forces.

The next two Articles extend the same respect and protection to menbers of armed forces specially trained for employment, in case of need, as hospital orderlies, nurses or auxiliary stretcher-bearer, in the search for or the collection, transport

or treatment of the wounded or sick and to the personnel of National Red Cross Societies and other Voluntary Aid Societies engaged in similar occupation.

Article 33.--Building and Material.—Art. 33 of the Convention provides for reservation of material of mobile medical units of the armed forces falling into the hands of the enemy for the care of the wounded and sick.

The building, material and stores of fixed medical establishments, of the armed forces is to remain subject to the laws of war, but will not be diverted from that purpose as long as they are required for the care of the wounded and sick. The commanders of the forces are authorised in case of urgent military necessity, to make use of the material, and building of fixed medical establishment for other purposes provided they make suitable arrangement for the wounded and sick of those establishments. There is a prohibition against intentional destruction of material and stores.

The real and personal property of Aid Societies to which the privileges of the Convention attach is not liable to be requisitioned by belligerents unless there is urgent necessity, and unless the welfare of the wounded and sick has been ensured.

Article 35—Medical Transport.—Article 35 provides for protection and respect to transports of wounded and sick or of medical equipment. Transports or vehicles of the wounded and sick fallen into the hands of the enemy shall be subject to laws of war on condition that wounded and sick therein are cared for.

Article 36.—Aircraft exclusively employed for the removal of wounded and sick and for transport of medical personnel and equipment are immune from attck and are to be respected by the belligerents while flying at heights, times and routes agreed upon between the belligerents. These aircrafts are to bear distinctive emblem so as to be clearly recognisable.

Article 37.—Under Article 37 such aircrafts may fly over the territory of neutral powers, land on it in case of necessity or use it at a port of call. They are to give neutral powers previous notice of their passage over their territory and are to obey all summons to alight on land, or water. They are immune from attack only when flying on routes, at heights and at times specifically agreed upon between the parties to the conflict and the neutral power concerned.

Article 45 Execution of the Convention.—The Convention under Article 45 requires such party to the conflict

through their Commanders-in-chief to ensure detailed execution of the directions of the Convention and to make provisions in conformity with the Convention for unforeseen circumstances.

Article 46.—Prohibits reprisals against the wounded, sick, personnel, buildings or equipments protected by the Convention.

Article 47.—In Article 47 the High Contracting Parties undertake in time of peace as in war to disseminate the text of the present Convention as widely as possible in their respective countries.

Repression of Abuses and Infractions.—The High Contracting Parties have undertaken to enact laws to provide effective penal sanctions for persons committing or ordering to be committed any of the grave breaches of the present Convention.

Grave breaches of the Convention shall be those involving the following acts if committed against persons or property protected by the Convention :—

1. Wilful killing ;
2. Torture or inhuman treatment including biological experiments ;
3. Wilfully causing great suffering or serious injury to body or health.
4. Extensive destruction and appropriation of property not justified by militaty necessity and carried out unlawfully and wantonly.

The responsibility of the High Contracting Parties in respect of grave breaches of the Convention is absolute.

Second Geneva Convention (Aug. 12 1949).—This Convention aims at ameliorating the condition of wounded, sick and shipwrecked members of armed forces at sea. It applies only to forces on board the ship in case of hostilities between land and naval forces of parties to the conflict. Forces on board the ship when put ashore will be governed by provisions of the First Convention of 1949. The provisions of this Convention is to be applied by neutral powers in respect of the wounded, sick, shipwrecked, members of the medical personnel and to chaplains of the armed forces of the parties to the conflict received or interned in their territory. The important provisions of this Convention are :—

Persons protected under the Convention.—The Convention makes it obligatory to respect and protect the wounded, sick and shipwrecked at sea belonging to :—

1. Members of the armed forces of the parties to the conflict and members of militias and volunteer corps forming part of armed forces.
2. Members of militias and of other volunteer corps belonging to parties to the conflict operating in or outside their territory whether occupied or not provided the militias and volunteer corps, (i) are commanded by a responsible officer, (ii) have a fixed distinct sign recognisable at a distance, (iii) carry arms openly, (iv) conduct their operations in accordance with cnstoms and laws of war.
3. Members of regular armed forces professing allegiance to a Government or an authority not recognised by Detaining Power.
4. Presons accompanying with permission armed forces such as civil members of military aircraft crews, was correspondents, supply contractors, members of labour units or of services responsible for walfare of armed forces.
5. Members of crews including masters, pilots and appreutices of the merchant marine and the crews of civil aircraft of the parties to the conflict who do not benefit by more favourable treatments under any other provisions of International Law.
6. Inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms for resistance without being regularly organised.

The persons protected are to be treated humanely and cared for by the parties to the conflict without distinction of race, colour, religion, sex and political opinion. Women are to receive all considerations due to their sex.

Right of belligerent warships.—All warships of a belligerent party has a right to demand surrender of the wounded, sick or shipwrecked on board military hospital ships and hospital ships belonging to relief societies or to private individuals as well as merchant vessels, yachts or other crafts provided the wounded and sick are in a fit condition to be moved and the warships are in a position to care for them.

Wounded and sick falling into enemy hands.—The wounded, sick and shipwrecked of a belligerent falling into enemy hands shall be prisoners of war and will be governed by

provisions of International Law relating to prisoners of war. The captor may send them to some of its port, to a neutral port or to a port in the enemy territory. If the wounded, sick and shipwrecked are sent to their home country they are prohibited from serving during the war.

Search and Record.—The parties to the conflict after each engagement, are required to take all possible measures without delay, to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensuee their adequate care and to search for the dead and prevent their being despoiled.

The parties to the conflict shall record in respect of each shipwrecked, wounded, sick or dead persons of the adverse party falling into their hands all particulars which may assist in his identification.

The record so made is to contain, if possible, the following particulars :—

(*a*) designation of the power on which he depends,
(*b*) army, regimental, personal or serial number,
(*c*) surname,
(*d*) first name or names,
(*e*) date of birth,
(*f*) any other particular shown in his identity card,
(*g*) date aud place of capture or death,
(*h*) particulars concerning wounds or illness or cause of death.

Hospital ships.—The Convention prohibits attack or capture of military hospital ships, that is to say ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick shipwrecked, to treating them and transporting them. Military hospital ships whose names and descriptions have been notified to the parties to the conflict ten days before their employment are to be respected and protected. This respect and protection is extended even to hospital ships utilised by National Red Cross Societies by officially recognised societies or by private persons provided notification of ther names and descriptions has been made to the parties to the conflict ten days before their employment, and they have received a commission from the party to the conflict on which they depend.

This protection is extended to hospital ships of any tonnage and to their life boats whenever they are operating Small craft employed by the State or by the officially recognised life-

boat institutions for coastal rescue operations are also entitled to respect and protection.

Hospital ships in a port which falls into the hands of the enemy shall be permitted to leave the said port. The High Contracting Parties have undertaken not to use hopital ships for any military purpose.

Merchant vessels which have been converted into hospital ships cannot be put to any other use throughout the duration of hostilities. The parties to the conflict have a right to control and search all vessels which are used as hospital ships and they are at liberty to refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and even detain them for a period not exceeding seven days from the time of interception if the gravity of circumstances so requires.

The hospital ships are to lose the protection guaranteed by this Convention if they commit, outside their humanitarian duties acts harmful to the enemy. Protection is to cease only after a warning and after such warning has remained unheeded. Hospital ships will not lose protection if they :—

(1) are armed for the maintenance of order, for their own defence or that of the sick and wounded.

(2) have an apparatus exclusively intended to facilitate navigation or communication.

(3) have portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed over to the proper service.

(4) are engaged in the care of the wounded, sick or shipwrecked civilians.

(5) are engaged in transport of equipment and of personnel intended exclusively for medical units over and above the normal requirements.

Medical and religious personnel.—Article 36 of the Convention lays down that the religious, medical and hospital personnel of hospital ships and their crews will be respected and protected and they may not be captured during the time they are in service of the hospital ship, whether or not there are wounded and sick on board.

The religious, medical and hospital personnel assigned to the medical or spiritual care of the persons protected under the Convention, if they fall into the hands of the enemy, are entitled to respect and protection and are entitled to carry on their

duties so long as it is necessary for the care of the wounded and sick. They are liable to be sent back as soon as the Commander-in-chief under whose authority they are, considers it practicable.

Medical Transports.—The Convention premits unobstructed passage to ships chartered for the purpose of transporting equipment solely intended for the treatment of wounded and sick of the armed forces or for prevention of disease. A party to the conflict may charter ships for transporting equipment exclusively needed for the treatment of the wounded and sick and for prevention of disease provided notice of the voyage of such ships has been given to the adverse party. The adverse party shall have power to board the carriers ships but will have no right to capture the ships or to seize the equipment carried.

Medical aircraft, that is to say, aircraft exclusively employed for the removal of the wounded, sick and shipwrecked and for the transport of medical personnel and equipment are immune from attack and are entitled to respect and protection while flying at heights, at times and on routes specifically agreed upon between the parties to the conflict concerned. Such aircrafts are to be clearly marked with distinctive emblem and are to carry their national colour on their lower, upper and lateral surfaces. Unless agreed otherwise, they are not to fly over enemy or enemy-occupied territory. They are bound to obey every summon to alight on land or water. In case of necessity they may fly over the territory of the neutral States, after giving a notice of their passage over their territory.

Repression of Abuses and Infraction.—The High Contracting Parties have undertaken to pass laws for the purpose of providing effective penal sanctions for persons committing or ordering to be committed, any grave breach of Convention. They are also under an obligation to search for persons alleged to have committed or to have ordered to be committed grave breaches of the Convention and to bring them before their own courts for such breaches. The High Contracting Parties are to take up necessary measures to suppress all acts contrary to the provisions of the Conventions other than grave breaches.

The following acts if committed against persons or property protected under the Convention constitute grave breaches :—

1. wilful killing ;

2. torture or inhuman treatment including biological experiments.

3. wilfully causing great suffering or serious injury to body or health.

4. Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

The High Contracting Parties are not allowed to absolve themselves of any liability incurred in respect of grave breaches of the Convention.

Third Geneva Convention, August 12, 1949.—This Convention relates to the treatment of prisoners of war. Some of its important provisions are :—

Application —This Conventions applies to all cases of declared war or any other armed conflict which may arise between two or more High Contracting parties even if the State of war is not recognised by one of them. It also applies to all cases of partial or total occupation of the territory of a High Contracting Party with or without armed resistance.

The powers who are parties to the Convention are bound by the provisons of the Conventton in their mutual dealings even if one of the parties to the conflict is not a party to the Convention.

Prisoners of war defined.—The Convention in Article 4 defines the term 'prisoners of war' who are entitled to its benefit. The following persons are to be considered prisoners of war if they fall into the hands of the enemy :—

1. Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of these armed forces.

2. Members of other militias and members of other volunteer corps including those of organised resistance movemements belonging to a party to the conflict and operating in or outside their own territory whether occupied or not if they, (*i*) are commanded by a responsible officer, (*ii*) have a fixed distinctive sign recognisable at a distance, (*iii*) carry arms openly and (*iv*) conduct their operations in accordance with the laws and customs of war.

3. Members of regular armed forces professing allegiance to a Government or authority not recognised by the Detaining Power.

4. Persons accompanying the armed forces with permission

and with an identity card, not being members of armed forces such as civil members of military air craft crews, war correspondents, supply contractors, members of labour units, or of services responsible for the welfare of armed forces.

5. Members of crews including masters, pilots and apprentices, of the merchant marine and crews of civil air craft of the party to the conflict who do not benefit by more favourable treatment under any other provisions of International Law.

6. Inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms for resistance and who have not formed into regular armed units.

7. Persons belonging or having belonged to, the armed forces of the occupied territory if the occupying power considers it necessary to intern them, even though it has originally liberated them while hostlities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

8. Persons of the above categories who have been received by neutral or non-belligerent powers on their territory and whom these powers are required to intern without prejudice to any more favourable treatment which the Powers may choose to give.

Under Article 5 the provisons of the Convention will apply to the prisoners of war from the time they fall into the power of the enemy and will remain applicable until their final release and repatriation.

General Provisions of Protection—Responsibility.—The responsibility for the treatment of prisoners of war lies on Detaining Power and not on the individuals or military units who have captured them. If the Detaining Power chooses, it may transfer the prisoners of war to a Power who is a party to the Convention after satisfying itself of the willingness and ability of such transferee Power to apply the Convention. When the prisoners of war are so transferred the responsibility of their treatment shifts to the transferee Power. In case the transferee Power fails to carry out the provisions of the Convention the transferring power shall, upon being notified by the Protecting Power, take effective measures to correct the situation and shall request the return of the prisoners of war.

Treatment.—Prisoners of war are always to be humanely

treated. Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war is prohibited and will constitute a serious breach of the Convention. No prisoner of war is to be subjected to physical mutilation or to medical or scientific experiments of any kind unless carried out in his interest. The prisoners of war are entitled to protection against acts of violence or intimidation and against insults and public curiosity. There can be no measures of reprisals against prisoners of war.

Prisoners of war are entitled in all circumstancess to respect for their person and their honour. Women prisoners are to be treated with all regard due to their sex. Prisoners of war are entitled to retain the full civil capacity which they enjoyed at the time of their capture. They are entitled to maintenance and medical attention free of charge.

Property of Prisoners.—The prisoners of war are entitled to remain in possession of all effects and articles of personal use, metal helmets gas masks; other articles of personal protection, articles use for clothing or feeding. But they can claim to remain in possession of arms, horses military equipment and military documents. Sums of money carried by prisoners of war may not be taken away from them except by order of an officer after the amount and particulars of the orders have been recordod in a special register and a receipt has been given under the signatures of the person issuing it. Money belonging to prisoners of war in the currency of the Detaining Power is to be placed at the credit of the prisoners.

The Detaining Power is authorised to remove valuable articles from the possession of the prisoner on grounds of security. Money belonging to the prisoners of war being in the currency of the Detaining Power shall be kept in safe custody of the Detaining Power and shall be returned to them at the end of their captivity.

Internment of prisoners of war.—Prisoners of war are liable to be interned at the discretion of the Detaining Power. The may not be allowed to move beyond certain limits. They may be released on parole or promise but cannot be compelled to accept liberty on parole or promise.

They are to be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. They are to be removed as soon as possible from areas which are unhealty. They cannot be sent to or detained in an area which is exposed to the fire of the combat zone. They are

entitled to selter against air bombardment and other hazards of war to the same extent as local civilian population.

Quarters, Food and Clothing.—Prisoners of war are to be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. In quartering them allowance is to be made for their habits and customs. The premises provided for the use of prisoners of war individually or collectively shall be entirely protected from dampness and adequately heated and lighted. All precautions must be taken against the danger of fire.

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Additional rations will be supplied to prisoners who are engaged in manual labour. Sufficient drinking water is to be supplied. Prisoners of war are allowed the use of tobacco.

Clothing, underwear and foot-wear are to be supplied to prisoners of war, making allowance for the climate of the region where they are detained.

There is also provision for the installation of canteens where prisoners may procure foodstuffs, soap, tobacco and other articles of daily use.

Hygiene and medical attention.—It is obligatory on the Detaining Power to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics. The camps are to be furnished with showers and baths. The prisoners are to be allowed conveniences, which conform to the rules of hygiene and cleanliness.

Every camp is to have an adequate infirmary where prisoners of war may have medical attention which they require. The Detaining Power is responsible for the treatment of the wounded and sick among the prisoners of war. Medical inspection of prioners of war is to be made at least once a month.

Religious, intellectual and physical activities.— The prisoners are to get complete freedom in the exercise of their religious duties including attendance at the service of their faith, provided they comply with disciplinary rules. Chaplains among the prisoners will be allowed to minister to their fellow prisoners. The prisoners may make a request for a Chaplain to be appointed for them.

The Detaing Powers is to encourage the practice of intel-

lectual, educational, recreational pursuits, sports and games among the prisoners. Sufficient open space shall be provided for outdoor games.

Descipline.—Every prisoners camp is required to be put under a commissioned officer who shall be supplied with a copy of this Convention and whose duty will be to ensure that its provisions are known to the camp staff and guard and who will be responsible for the application of the provisions of the Convention.

Rules and regulations of discipline in the language of prisoners will be posted in a place where the prisoners may read them. Copies of these rules and regulations will be supplied to them on request.

Labour of Prisoners of War.—The Detaining Powers may utilise the labour of prisoners of war who are physically fit with a view particularly to maintaining them in good health and with due regard to their age, sex, rank and physical aptitude. Non-commissioned officers among the prisoners will be required to do supervisory work. Prisoners are to be compelled to do the following type of work :—

1. Agriculture.

2. Industries connected with the production or extraction of raw material, manufacturing industries with the exception of metallurgical, machinery and chemical industries ; public work and building operations having no military character or purpose.

3. Transport and handling of stores not having military character or purpose.

4. Commercial business, arts and crafts.

5. Domestic service.

6. Public utility services having no military character or service.

The prisoners are to be allowed suitable working conditions. Conditions of labour are in no case to be rendered more arduous by disciplinary measures. No work of unhealthy or dangerous nature shall be taken from prisoners. Duration of daily labour shall not be excessive and will not exceed that permitted for civilian workers in the district. They are to be allowed at least one hour's rest in the middle of the day.

Prisoners of war shall receive a fair working rate of pay from the detaining authorities.

Right of Complaints.—Prisoners of war have the right to make known to the military authorities in whose possesion they are, their requests regarding the condition of captivity to which they are subjected. They have also the un-restricted right of making complaints regarding the treatment given to them by the Detaining Power. The complaints may be either made direct or through Protecting Power. These requests and complaints are to be transmitted immediately.

Prisoners' representatives are permitted to send periodical reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting power.

Penal and disciplinary.—Prisoners of war are subject to the laws, regulations and orders in force in the armed forces of the Detaining Power. The Detaing Power has to ensure that competent authorities dealing with prisoners of war exercise the greatest leniency and adopt wherever possible disciplinary rather than judicial measures.

A prisoner of war shall be tried by a military court unless the existing laws of the Detaining Power permit the civil courts to try a member of the armed forces in respect of an offence alleged to have been committed by the prisoner. A prisoner of war is not to be punished more than once for the same act or on the same charge.

Prisoner of war is to be sentenced by the military authorities and Courts of the Detaining Power only to penalties provided for in respect of members of armed forces of Detaining Power who have committed the same offence. Courts are to be lenient in punishment of the prisoners of war and are not bound to apply the minimum penalty prescribed.

Disclplinary punishments may take the shape of a fine not exceeding 50 per cent of the advances of pay and working pay which the prisoner would otherwise receive according to the provisions of the Convention during a period of not more than thirty days, discontinuance of privileges granted over and above the treatment provided for by the present Convention ; fatigue duties not exceeding two hours daily; and confinement. Punishment in shape of fatigue is not to be awarded in case of officers The duration of any single punishment shall in no case exceed thirty days.

Judicial Proceedings.—No prisoner of war will be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International Law in force at the time the said act was commited. No moral or physical pressure will be put to extract an admission of the guilt. There is

to be no Conviction without affording an apportunity to the accused to put forward his defence and the assistance of a qualified advocate or counsel. Every precaution for securing an impartial trial for prisoners of war will be taken by the Detaining Power.

Fourth Geneva Convention of August 12, 1949.— This Convention lays down rules for the protection of civilian persons in time of war. Some of the important provisions are :—

Protected Persons.—The Convention protects those persons who during a conflict or occupation fall into the hands of a party to the conflict or occupying power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State present in the territory of a belligerent State and nationals of co-belligerent State are not to be deemed protected while the State of which they are nationals has normal diplomatic representation in the State in whose territory they are present.

Persons protected by the First, Second and Third Geneva Convention of August 12, 1949 shall not be considered protected by this Convention.

Operation.—This Convention will be in operation from the outset of any conflict or occupation. Its application will cease on the general close of military operations.

Protection of population against War.—After the outbreak of hostilities, the parties to the conflict may establish either in their own territory or if necessary in occupied areas hospital and safety zones and localities so organised as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Any party to the conflict may either direct or through a neutral State or some humanitarian organization propose to the adverse party to establish in the region where fighting is taking place neutralised Zones for the shelter from effects of war, of wounded and sick combatants or non-combatants and civilians who do not take part in hostilities and who while in the Zones perform no work of a military character.

The wounded and sick, infirm and expectant mothers are to be particularly respected and protected. It shall be the duty of parties to the conflict to endeavour to conclude local agreements for the removal from beseized or encircled areas, of

wounded, sick, infirm and aged persons, children and maternity cases, and for the passage of ministers of all religious, medical personnel and medical equipment on their way to such areas.

The parties to the conflict will at all times respect and protect civilian hospitals organised to give care to the wounded and sick, the infirm and maternity cases. Persons regularly and solely engaged in the operation and administration of civilian hospitals shall be respected and protected.

Convoys of vehicles, hospital trains, specially provided vessels on sea, aircraft solely meant for removal of civilians, wounded, sick infirm and maternity cases are to be respected and protected.

Treatment of Protected Persons.—The Convention guarantees to protected persons, respect for their persons, their honour, their family rights, their religious convictions and practices and their manners and customs. They shall be humanely treated, and shall be protected against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.

Physical or moral coercion shall not be exercised against protected persons in particular to obtain information from them or from third persons. Nothing is to be done to cause physical suffering or extermination of protected persons. Reprisals against protected persons and their property are prohibited.

The taking of hostages is prohibited.

Protected persons in cccupied Territories.—The Convention lays down that protection of persons present in occupied territory shall not be deprived in any case or in any manner whatsoever, of the benefits of the Convention by reason of any change into the institutions or government of the territory nor by any agreement concluded between the authorities of the occupied territory and the occupying power nor by any total or partial annexation.

Protected persons who are not nationals of the Power whose territory is occupied have a right of departure in accordance with the provisions of the Convention in respect thereof. It is prohibited to order individual or mass forcible transfers and deportations of protected persons from occupied territory to the territory of the occupying Power or to any other country. It is only on grounds of security of the population or imperative military considerations that the occupying Power can order

individual or mass evacuation of the protected persons provided it has ensured that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygience, health, safety and nutrition and that members of the same family are not separated.

Protected persons cannot be compelled by the occupying Power to serve in its armed or auxilary forces. They may be compelled to do only that work which is necessary either for the needs of the army of occupation, or for the public utility services or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. They cannot be compelled to do any work which may involve them in the obligation of taking part in military operations.

Property in occupied territory.—The occupying Power is prohibited to destory real or personal property belonging individually or collectively to private persons or to the State or to other public authorities or to social or cooperative organisations unless the necessity of military operations require destruction of such property.

Judges and Public Officials.—The occupying power is not to alter the status of public officials or judges in the occupied territory and will not take measures of coercion or descrimination against them if they for reason of conscience abstain from fulfilling their functions.

The occupying power is at liberty to remove public officials from their posts.

Food and medical supplies.—The occupying Power is responsible to the fullest extent of the means available to it, for the food and medical supplies of the population. In case such supplies are inadequate the occupying Powers is to bring in necessary supplies of foodstuff and medical stores.

The occupying Power is not to requisition foodstuffs, articles or medical supplies available in the occupied territory except for use by the occupation forces and administration personnel after allowance has been made for the needs of the civilian population.

The occupying Power is also responsible for the health of the population of the occupied territory and for this purpose it has a duty to maintain the medical and hospital establishments and services, public health and hygiene in the occupied territory. Civil hospitals may be requisitioned only temporarily on the ground of urgent necessity for the care of military

wounded and sick after making suitable arrangements for the needs of the population of the occupied territory.

Law and justice in occupied territory.—The penal laws of the occupied territory shall remain in force. The occupying Power may repeal or suspend those laws in case they constitute a threat to its security or an obstruction to the application of the Convention. The tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The occupying Power is entitled to subject the population of the occupied territory to provisions which are essential for the purpose of enabling it to fulfil its obligations under the Convention, for maintaining orderly Government and for ensuring the security of the occupying Power, of members and property of the occupying forces or administration.

The occupying Power may enact penal laws and may enforce them after due publication. It will however not make these laws retroactive.

Protected persons shall not be arrested, prosecuted or convicted by the occupying Power for acts committed or for opinion expressed before the occupation or during temporary interruption thereof with the exception of breaches, of the laws and customs of war.

The competent courts of the occupying Power will not pronounce a sentence before holding a regular trial. Accused persons shall have the right to present evidence necessary to their defence and may call witnesses. They will have the assistance of a qualified advocate or counsel of their own choice. In case they do not exercise their choice, the protecting Power is to provide them with an advocate or counsel.

A convicted person is to have a right of appeal provided for in the laws applied by the court. The accused is to be informed of this right of appeal. In death sentences the accused will always have a right of petition for pardon or reprieve.

Internees and their treatment.—Protected persons are liable to be interned on the ground of imperative reasons of security. If the Detaing Power considers it absolutely necessary for its security it may intern protected persons. Protected persons are also liable to be interned if they commit an offence which is solely intended to harm the occupying Power but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damages the property of the

occupying forces or administrations or installations used by them.

Internees are to retain their full capacity and shall exercise such attendant rights as may be computible with their States. Parties to the conflict who intern protected persons are bound to provide maintenance and medical attention free of charge. The internees are to be accommodated according their nationality, language and customs. Their accommodation will be healthy. Daily foodrations for internees shall be sufficient, in quantity, quality and variety to keep them in good state of health and prevent development of nutritional deficiencies. Internees shall be given all facilities to provide themselves with the necessary clothing footwear and change of under wear. They will be entitled to medical attention and shall enjoy complete freedom in the exercise of their religious duties.

Internees are permitted to retain articles of personal use. All internees shall receive regular allowances sufficient to enable them to purchase goods and articles such as tobacco toilet requisites, etc.

Internees shall have a right of making complaints to the authorities of the Detaining Power about the condition of internment to which they are subjected. They have also the right of making complaints to the Protecting Powers.

Penal and Disciplinary Sanctions.—The penal laws in force in the territory in which protected persons are interned will continue to apply to them if they commit offences during internment. If general laws, regulations or orders declare acts comitted by internees to be punishable, where as the same acts are not punishable when committed by persons who are not interness such acts shall entail disciplinary punishments only. No internee is to be punished more than once for the same act or on the same count. The courts or authorities trying the internees while passing sentences are to take this fact into consideration that the internees are not the nationals of the Detaining Power and they are not bound to pass the minimum sentence prescribed.

Internees who are recaptured after having escaped or when attempting to escape shall be liable only to disciplinary punishment in respect of this act, even if it is a repeated offence.

Release and repatriation.—Each internee shall be released by the Detaining Power as soon as the reasons which neces-

sitated his interment ceased to exist. Internment shall cease as soon as possible after the close of hostilities. The High Contracting Parties shall endeavour, upon the close of hostilities or occupation to ensure the return of all internees to their last place of residence or to facilitate their repatriation.

The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned or if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.

HAGUE CONFERENCES

The Hague Conferences of 1899 and 1907 stand out as two important landmarks in the development of International Law. The Nineteenth Century saw important events which led to the establishment of a community of nations and these Hague Conferences demonstrated the possibility of law-making by consent of Nations. The first Hague Conference of 1899 was held at the invitation of the Emperor Nicholas II of Russia with the primary object of promoting a general limitation of armaments. Although the Conference failed to achieve the object for which it met it succeeded in producing two Conventions, *viz* ; the Convention for the Pacific Settlement of International Disputes and the Covention with respect to the laws and customs of War on land. The first Convention was arrived at for the purpose of minimizing the possibilities of international conflicts and the second Convention was entered into with a view to minimize the hardship brought about by internatiomal conflict.

The second Hague Conference met on June 15, 1907 with the object of strengthening the political structure of the International Community and to lay down and restate rules conducive to the well-being of the States. This Conference was represented by nearly all the States of the World. It produced Thirteen Conventions of which eleven related to matters connected with war. The Conventions with respect to the laws and customs of war of 1899 was revised and supplemented by Conventions dealing with various other matters connected with war. The Convention for the Pacific Settlement of International Disputes was also amended.

The Conventions produced at these two Conferences are authoritative sources of the rules of International Law on the matter convened by them. Thk two Conferences, however, failed to organize the International community for the main-

tenance of law and order within it. The Conferences made no effort to bring about co-operation among States to do away with the right of the individual State to wage war for promoting its own interests. The Conference entered upon their task with the assumption that war was inevitable for the existence of States. Their merit lies in the fact that they made a sincere effort for the codification of international disputes on the subjects which engaged their attention.

Hague Convention of 1899.—(Permanent Court of Arbitration).—Having failed to tackle the problem of limitation of armament this Conference succeeded in arriving at two Conventions already stated. The Convention for the Pacific Settlement of International Disputes for the first time recognised arbitration as a mode of settlement of international disputes. It laid emphasis on the fact that arbitration had for its object "the settlement of differences between States by Judges of their own choice and on the basis of respect for law." The Convention required the parties to an international controversy to come to an agreement to have the controversy settled by arbitration. Once the parties arrived at an agreement to refer their dispute to arbitration they were in good faith bound by the award. This Convention led to the establishment of the Permanent Court of Arbitration. It was not really a permanent tribunal but was meant to indicate a panel of judges nominated by all signatory States. Each signatory State had the right of nominating four persons as Judges for this panel. The parties to the dispute were free to choose their arbitrators from this list of Judges. Each party was given a right to choose two arbitrators. The umpire was chosen by the arbitrators of the parties. The arbitrators and the umpire constituted this Permanent Court of Arbitration.

The Convention for Public Settlement of International disputes did not, however, compel the parties to it to refer their disputes to arbitration. The parties to the Convention were not bound to do it. The matter of reference to arbitration was left to their good sense. The signatories to the Convention contented themselves with the statement that 'in question of a legal nature and specially in the Interpretation or application of Inrernational Convention arbitration is recognised by the signatory Powers as the most effective and at the same time the most equitáble, means of settling disputes which diplomacy has failed to settle."

The second Convention produced by the Hague Conference of 1899 was with respect to the laws and customs of war. It

has lost all its importance as it was revised by the Second Hague Conference of 1907 and was replaced by Convention IV of 1907 commonly known as Hague Regulations which according to the opinion of the Nuremburg International Military Tribunal embody rules recognised by all civilized nations and regarded "as being declaratory of the laws and customs of war..........."

Second Hague Conference of 1907.—This Conference produced thirteen Conventions which are noticed below :—

1. The Hague Convention for the Pacific Settlement of International Disputes.—This Convention aims at enlarging the provisions of the similar Convention arrived at in the First Hague Conference of 1899. It contains ninety seven Ariticles. The Convention begins with a recomendation to embody good offices and mediation as the modes of settlement of international controversies. It lays down that the States which are not parties to a dispute have a right to offer their good offices and mediation for settlement of the dispute and that this action on the part of third States is not to be referred as an unfriendly act. The Convention provides that the acceptance of mediation as a mode of settling the dispute has not the effect of inturrupting or delying the preparatory measures for wars.

The Convention dealt with arbitration at length acknowledging that differences of a legal character including those regarding the interpretation or application of treaties can be properly and equitably settled through arbitration. But it may be noticed that it did not make it obligatory on States to refer their dispute to arbitration. The parties to the dispute were given an option to refer the matter to the Permanent Court of Arbitration or to one or several other arbitrators chosen by them either from the Judges of the Permanent Court of Arbitration or otherwise. The parties were to agree to lay down a procedure to be followed in arbitration. The award given by the arbitrator or arbitrators was to bind the parties. Any question relating to the interpretation or execution of the award was to be referred to the tribunal which made the award. The parties were to share the expenses of arbitration tribunal.

2. The Hague Convention (**No. II**).—Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.—

This Convention arrived to solve an important question which had been a source of trouble in the inter-nation com-

munity. The question that had arisen was whether a State had a right to resort to force to collect the debts of its citizens against foreign governments. The blockade of 1902 with the object of collecting claims against Venezuela gave rise to a sharp controversy. The Dargo Doctrine was announced by the foreign minister of Argentine Republic who asserted that "a public debt cannot give rise to the right of intervention and much less to the occupation of the soil of any American nation by any European power." This question was sought to be solved at the Second Hague Conference of 1907 which produced this convention.

By this Convention the Hague Contracting Powers agreed "not to have recourse to armed forces for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals," provided, that the debtor State should not refuse to reply to an offer of arbitration or should not after arbitration fail to act according to the award.

3. **Hague Convention (No. III)—Relative to the opening of Hostilities.**—The war between Russia and Japan in 1904 without a personal declaration of war gave rise to a feeling in the international community that it was desirable to have some written rules with regard to the commencement of hostitilities. This Convention aimed to solve this question and by it the High Contracting Parties agreed that war "must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war," The Convention further provided that the neutral powers were to be given notice of the existance of a state of war and that a state of war will not affect neutral powers—unless it, existence had been notified to them or they had knowledge of the state of war.

The defect of this Convention was that it did not lay down that failure to make a formal declaration of war would not render the war illegal. Moreover the Convention does not prescribe a minimum length of time which must elapse after the ultimatum and before the opening of hostilities.

4. **Hague Convention (No. IV)—Respecting the Laws and Customs of War on land—(Hague Regulations).**—This Convention deals exclusively with the rules of warfare on land and is not a complete code in itself. But it deals with most of the provisions of laws of war and constitutes an authoritative exposition of the subject. Matters not covered by it

remain to be governed by the usages and customs of war. Many of its provisions are dealt with in Chapter XXI.

Three Declarations were also drawn up but as they were not signed by sufficient number of States they remained invalid. The first Declaration prohibited the discharge of projectiles and explosives from balloons and by other new methods of a similar natare' for period upto the close of the Third Hague Conference. Snch a declaration for period of five years had been drawn up in the First Hague Conference. This Declaration of 1907 remained unratified by great Powers before the First World War and thus it had no binding force.

The second Declaration was to the effect that it was agreed that the parties to the conflict would abstain from the use of projectiles the sole object of which was the diffusion of asphyxiating and deletarious gases. The third Declaration contained an agreement that bullets which expand or flatten easily in the human body such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions will not be used. Both these Declarations remained unratified and therefore have no legal validity.

5. **Hague Convention (No. V)—Respecting the rights and duties of Neutral Powers and persons in case of war on land.**—This is an important Convention dealing with the subject of neutrality. It lays down that the duty of the belligerent is to respect the sovereign rights of neutral powers and to abstain from any act which would if knowingly permitted by any Power constitute a violation of neutrality. It provides that any facility directly concerning military or naval opetraions granted to any of or both the belligerents would be illegal. This Convention has not been ratified by Great Britain.

6 **Hague Convention (No. VI,—Relative to the status of Enemy Merchant Ships at the outbreak of hostilities.**— This Convention restated the rule hitherto followed by States that privately owned merchant vessels were to be permitted departure from port where they may be on the opening of the hostilities. It declared that it was desirable to allow a ship belonging to one of the belligerents lying in enemy port to depart on the opening of hostilities either immediately or within a specified time. The Convention further permitted the belligerent to detain a ship lying in its port and belonging to the enemy with an undertaking to restore to its owner after war or to requisition it on payment of compensation.

7. **Hague Convention (No. VII)—Relating to the Conversion of Merchant Ships into Warships.**—This Convention was signed by all the States represented at the Second Hague Conference of 1907 except United States of America, China, San Domingo, Nicaragua and Uruguay.

The Convention provided for conditions under which converison of merchants men could take place. It put a stop to the old practice of privateering with all its ill consequences. It lays down that "a merchant ship converted into warship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and the responsibility of the Power whose flag it flies." The Convention provides that such vessels should bear external marks of warships, that its Commander must be in the service of the State, must be duly commissioned and his name must figure in the list of the officers of the military fleet, and its crew must be subject to the rules of military discipline.

The Convention further provides that the converted ship must observe the laws and usages of war and her conversion must as soon as possible be announced in the list of the ships of his military fleet by the belligerent concerned.

8. **Hague Convention (No. VIII)—Relating to the Laying of Automatic Submarine Contact Mines.**—The Convention does not forbid the use of contact mines but places a restriction on their use for the purpose of mitigating the security of war. It makes a distinction between anchored and unanchored mines, for it prohibits beiligerents from laying unanchored automatic contact mines except when they are so constructed as to become harmless one hour at the most after the person who laid them ceases to control them while it obsolutely prohibits anchored mines which do not become harmless as soon as they have broken loose from thei rmoorings." It prohibited the laying of anchored mines off the coast or the ports of the enemy with the sole object of intercepting commercial shipping.

The Convention emphasized that when automatic contact mines are employed every possible precaution must be taken for the security of peaceful shipping and to take care that these mines become harmless within a limited time. The belligerents were also required to notify the danger zones for the safty of shipping.

9. **Hague Convention (No. IX)—Respecting Bombardment by Naval Forces in time of War.**—This Convention prohibited bombardment by naval forces of undefended ports

and towns. It lays down that a place connot be bombarded solely because automatic submarine contact mines are anchored in the harbour. It permitted bombardment of military works, military and naval establishments, depots of arms or war material workshops or plant which can be utilised for military and men-of War in the horbour of undefended places. It also provides that if local authorities fail with legitimate requisitions, undefended places may be bombarded.

The Convention lays down that in bombarding care is to be taken to spare buildings devoted to public worship, art, science or charitable purposes, historical monuments and places, where sick and wounded are present. The naval commander before commencing bombardment is to give a warning. It is forbidden to give over to pillage of a town or place.

10. Hague Convention (No. X)—For the Adoption to Maritime Warfare of the principles of the Geneva Convention.—This Convention has now beeu revised and improved by the Conventicn of August 12, 1949 for the Amelioration of the condition of wounded, sick, and ship-wrecked members of the armed forces at sea which has been already discused.

11. Hague Convention (No. XI).—Relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War.—This Convention restricts the right of capture in Naval War. It adopts the customary rule that coastal firing vessels and small boats employed in local trade are exempt from capture unless they are found taking part in the hostilities. It also lays down that vessels charged with religious, seientific or philanthrophic missions are exempt from capture.

It grants immunity from capture to enemy mailboats but does not exept correspondence destined to or from a blockaded port. It provides that members of the crew who belong to neutral State cannot be made prisoners of war and that captain and officers who are subjects of neutral States are to be made prisoners of War only when they refuse to give an understanding in writing not to serve on the enemy ship during the war.

10. Hague Convention (No. XII)—Relating to the creation of an International Prize Court.—This Convention arrived at the establishment of an International Prize Court to serve as a Court of Appeal from decisions of the Prize Courts of either belligerent which related to the interests of neutral

Powers or their subjects. It was not ratified and has therefore no legal validity.

13. Hague Convention (No. XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.—This Convention deals with problems connected with neutrality in naval war and is a supplement to Convention No. V whića deals with neutrrlity-in war on land. A few of the important rules laid down by it are :—

1. It prohibits belligerents from using neutral ports and waters as a base of naval operations against their adversaries.

2. It provides that belligerent men-of-war must not find shelter in a neutral ports for an undue length of time in order to escape capture.

3. A neutral is to warn all belligerent men-of-war then in his ports, roadsteads in territorial waters to deport within twenty-four hours in such other time as as it way prescribe.

4. A belligerent man-of-war is to be prevented by the neutral State to enrol sailors in its port. It may however be allowed to get such few hands as are necessary to navigate the vessel safe to the nearest port.

5. Belligerent Warships which have shipped in a port belonging to a neutral Power may not within within the succeeding three months, replenish their supply in a port of the same Power.

6. The belligerent men-of-war, except those for the time having exclusively devoted to religious, scientific or philanthropic purposes must not prolong their stay in neutral ports and waters beyond the time permitted except on account of damage or stress of weather.

7. The mere passage of belligerent men-of-war and their prizes through neutral waters does not violate neutrality.

8. When a ship has been captured in the territorial waters of a neutral Power such Power must if the prize is still within its jurisdiction employ the means on its disposal to release the prize, its officers and crew, and to intern the prize crew.

LEADING CASES

1. The S. S. Lotus

(1927) SERIES A, No. 10

PERMANENT COURT OF INTERNATIONAL JUSTICE

(International Law and Territorial and Personal Jurisdiction)

Facts.—There was a collision on the high seas on August 2, 1926 between the French Mail-Steamer, Lotus, on its way to Constantinople and the Turkish Collier, Boz-kourt. As a result of this collision the Boz-kourt sank and eight Turkish subjects on board the Boz-kourt were lost. On the arrival of the Lotus at Constantinople the Turkish authorities arrested Lieutenant Demons, a French citizen and Navigating Officer of the Lotus at the time of the collision and also Hasan Bey, the Captain of Boz-kourt.

The Criminal Court at Stamboul proceeded to try Lieut. Demons and Hasan Bey on a charge of man-slaughter. Lieut. Demons raised the plea of jurisdiction which was repelled by the Court. After trial the Court sentenced Leut. Demons to eighty days imprisonment and a fine of £ 32, Hasan Bey was also sentenced to a heavier punishment. The French Government in the meantime opened diplomatic negotiations for the release of Lieutenant Demons. These negotiations ended in a compromise whereby the following two questions were referred to the Permanent Court of International Justice.

1. Has Turkey contrary to Art. 15 of the Convention of Lausanne of July 24, 1923, respecting conditions of residence, business and jurisdiction, acted in conflict with the princples of International law, and if so, what principles by insinuating, following the collision which occurred on August 2, 1926 on the high seas between the French Steamer Lotus and the Turkish Steamer Boz-kourt and upon the arrival of the French Steamer at Constantinople—as well as against the Captain of the Turkish Steamship joint criminal proceedings in pursuance of Turkish Law against Mr. Demons, officer of the watch on board the Lotus at the time of the collision, in consequence of the loss of the Boz-kourt having involved the death of eight Turkish sailors and passengers ?

2. Should the reply be in the affirmative, what pecuniary reparation is due to Mr. Demons, provided, according to the principles of International Law, reparation should be made in similar cases?

The French Government put forward three arguments :—

1. International Law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of nationality of the victim; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.

2. International Law recognises the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.

3. Lastly, this principle is especially applicable in collision cases.

The Permanent Court of International Justice held :

1. "Once it is admitted that the effects of the offence were produced on the Turkish vessel it becomes impossible to hold that there is a rule of International Law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship.........

"It has been sought to argue that the offence of man-slaughter cannot be localised at the spot where the mortal effect is felt; for the effect is not intentional and it cannot be said that there is, in the mind of the delinquent, any culpable intent directed towards the territory where the mortal effect is produced. In reply to this argument it might be observed that the effect is a factor of outstanding importance in offences such as man-slaughter which are punished precisely on consideration of their effects rather than of the subjective intention of the delinquent."

2. "It is certainly true that—apart from special cases which are defined by International Law—vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. . . . ".

"Bul it by no means follows that a State can never in its

own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the Seas, a ship is placed in the same position as national territory ; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel upon the high seas must be regarded as it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effect on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion therefore be drawn that, there is no rule of International Law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting accordingly, the delinquent."

3. "The conclusion at which the Court, has therefore, arrived at is that there is no rule of International Law in regard to collision cases to the effect that Criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown . . .

"The offence for which Lieutenant Demons appears to have been prosecuted was an act—of negligence or imprudence—having its origin on the board the Lotus, whilst its effects made themselves felt on board the Boz-Kourt. These two elements are legally entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrence which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction. . . . . ."

4. Lastly, Turkey did not act contrary to the principles of International Law.

The second question was not however decided.

2. Chung Chi Cheung *vs.* The King.

(1939) A. C. 160 AND A. I. R. 1939 P. C. 69

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(International Law)

The Appellant a British subject was cabin boy on board a Chinese armed public vessel. While the vessel was on the territorial waters of Hongkong the appellant shot and killed the Captain, a British subject in the service of the Chinese Government. He then went up the ladder to the bridge and shot and wounded the acting Chief Officer and then went below and shot and wounded himself. The vessel was without delay brought to Hongkong where the Police took the appellant to the hospital.

Extradition proceedings commenced at the instance of the Chinese Government failed inasmuch as the appellant was a British national. He was again arrested and was tried for the offence of murder. The Court sentenced him to death.

The appeal came up for hearing before the Judicial Committee of the Privy Council and it was dismissed.

In this case Lord Atkin in pronouncing the judgment laid down the following important principles :

1. "It must be always remembered that so far at any rate as the Courts of this country are concerned, International Law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own Code of substantial law or procedure. The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by Statutes or finally declared by their tribunals".

2. "The true view is that in accordance with the conventions of International Law, the territorial sovereigns grant to foreign sovereigns and their envoys and public ships and the naval forces carried by such ships certain immunities. Some

are well settled : others are uncertain. When the local Court is faced with a case where such immunities come into question it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it. The sovereign himself, his envoy and his property including his public armed ships are not to be subjected to legal process. These immunities are well settled."

3. "Over offences committed on board ship by one member of the crew upon another the local Courts would not exercise jurisdiction ... It is difficult to see why the fact that either the victim or the offenders or both are local nationals should make a difference if both are members of the crew."

In this case Their Lordships held that the Chinese Government submitted to the jurisdiction of the British Court at Hong-Kong and on this ground the trial was held to be quite proper and legal.

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3. West Rand Central Gold Mining Co. Ltd. *vs.* The King

(1905) 2. K. B. 39

KING'S BENCH DIVISION

(International and Municipal Law and State Succession.)

The West Rand Central Gold Mining Company registered in England was working gold mines at Transval. Two parcels of gold belonging to the Company were seized by the officials of the South African Republic. Under the law in force, the Government of the South African Republic was bound to return the gold or to pay its price.

After the aforesaid seizure of the gold War broke out between Great Britain and the South African Republic. As a result of this War the Republic was conquered and its territory was annexed by the British Government. After this annexation the Company presented a petition of right claiming the return of the gold or the payment of its price on the ground that the British Government had succeeded to all the rights and duties, of the defeated Republic.

Lord Alverstone C. J. observed thus :—

1. "Before, however, dealing with the specific passages in the writings of jurists upon which the applicants rely we desire to consider the proposition, that by International Law the conquering country is bound to fulfil the obligations of the

conquered, upon principle ; and upon principle we think it cannot be sustained. When making peace the conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he would adopt them. It is a case in which the only law is that of military force . . . We can well understand that, if by public proclamation or by convention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State."

2. "It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country and that to which we have assented along with other nations in general may properly be called International Law and as such will be acknowledged and applied by our Municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of International Law may be relevant."

In the result the Court held that no right on part of the applicants was disclosed by the petition which could be enforced against His Majesty in this or any other Municipal Court. The petition of right was thus rejected.

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4. The 'Paquete Habana' and the 'Lola'

(1899) 175 U. S. 677

UNITED STATES SUPREME COURT

(Usages and Customs of Civilized Nations).

During the American—Spanish War of 1898 two fishing boats, the 'Paquete Habana' and the 'Lola' owned by Spanish subjects were captured by the cruisers belonging to the United States. These fishing boats were really sailing in connection with their fishing venture and did not carry either arms or ammunition. They had no knowledge of the blockade and were not attempting to commit any breach of the blockade. Although they had enemy character, their release was demanded on the ground that fishing boats were inviolable under International Law.

The Court had to decide whether under the rules of International Law fishing boats were exempt from capture.

Mr. Justice Gray who delivered the judgment of the majority of the Supreme Court laid down the following principles :

1. That International Law was a part of the law of the United States.

2. That in an enquiry into the question as to what International Law is, resort must be had to the usages and customs of the civilized nations and as evidence of these to the works of jurists and commentators.

3. That according to ancient usage among civilized nations which has ripened into a rule of International Law coast fishing vessels engaged in catching fishes are exempt from capture as prize of War.

4. That the Prize Courts administering the law of nations are bound to apply the rule that fishing boats were exempt from capture as prize of War.

The Court held that the capture of 'Paquete Habana' and the 'Lola' was unlawful and passed a decree of restitution.

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5. The Alabama Claims

(1872) MOORE, INTERNATIONAL ARBITRATION P. 653
UNITED STATES—GREAT BRITAIN, COLONIES ARBITRATION

These claims were preferred by the United States Government against Great Britain on the allegation that during American Civil War many vessels were, after being built in English shipyards for the use of the Confederate Navy, fitted with heavy guns and were directed to raid American Commerce. One of these commerce raiders was the Alabama which had been built at Liverpool and sailed from that port on its mission. She captured seventy United States vessels and thus caused heavy losses to the United States. The United States Government claimed compensation for the heavy losses caused by Confederate cruisers which had been built in British ports. After certain negotiations the Treaty of Washington was signed in 1871 and it was agreed to refer the matter to an arbitral Tribunal consisting of one American and one British member along with three neutral members. The Treaty contained three rules of law which the Tribunal was bound to apply in deciding the matter. The parties to the Treaty undertook to follow the rules in future and invited other maritime powers to accede to them. The rules were :

'A neutral Government is bound—

'First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or to carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.'

'Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.'

'Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligation and duties.'

The Tribunal held that Great Britain failed to use due diligence in the performance of its neutral obligations and it omitted to take in due time any effective measures to prevent violation of these obligations and passed a decree for compensation in favour of the United States.

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6. The Zamora

(1916) 2 A. C. 77

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(Prize Court, International and Municipal Law, Neutrality, Blockade, etc.)

The Zamora, a Swedish vessel carrying copper was captured by a British cruiser during her voyage from New York to Stockholm. It was brought to port and the captor claimed condemnation on the ground that more than half of the cargo carried by Zamora was contraband. In the alternative, it was prayed that the cargo may either be sold or detained on the ground that the cargo was either enemy property or had a hostile destination.

On a writ by the Public Prosecutor the President made an order under Order 29 Rule 1 of the Prize Court Rules giving leave to the War Department to requisition the copper. An appeal was preferred to the Privy Council against this order of the President. In delivering this memorable judgment Lord Parker made the following observations :—

" . . . The law which the Prize Court is to administer is not the national or . . . the municipal law, but the law of nations— . . . international law. It is worth while dwelling for a moment on this distinction. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law it enforces may, therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It needs to inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement."

"If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions."

"The primary duty of the Prize Court . . . is to preserve the *res* for delivery to the persons who ultimately establish their title. The inherent power of the Court as to sale or realisation is confined to cases where this cannot be done, either because the *res* is perishable in its nature, or because there is some other circumstance which renders its preservation imposssible or difficult."

". . . The right of requisition is not, in their (Lordships') opinion, an absolute right but, a right exercisable in certain circumstances and for certain purposes only. Further, international usage requires all captures to be brought promptly into the Prize Court for adjudication, and the right to requisition, therefore, ought as a general rule to be exercised only when this has been done. It is for the Court, and not for the Executive of the belligerent State, to decide whether the right claimed can be exercised in any particular case. . .".

"A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate reelase. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable."

The Privy Council held that the order of the President was not justified and directed the appellant to move the Court below for such damages as might have been sustained by reason of this order in the event of its success in proceedings for condemnation.

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7. The Tokyo Trial

Please see Chapter LII on War Crimes.

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8. The Nuremberg Judgment (1946)

C. M. D. 6964 (1246)

THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG

Please see Chapter LII, on War Crimes

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9. The Cristina

(1938) A. C. 485

HOUSE OF LORDS

(International and Municipal Law and Recognition.)

The *Cristina*, a Spanish vessel registered at Bilbao after having left Spain was on her way to Cardiff. While she was thus on her voyage the Government of Spanish Republic promulgated an order requisitioning all vessels registered at Bilbao. When *Cristina* reached Cardiff and was lying there, she was requisitioned. The owners of the vessel applied for a writ *in rem.*

The Spanish Republic raised an objection that it being a foreign sovereign State could not be impleaded and that the action was liable to be dismissed on that ground.

Lord Wright observed that there are general principles of International Law according to which a Sovereign State is held to be immune from jurisdiction of another State and that these principles are binding on the Municipal Courts of this country. He further observed that no State can claim jurisdiction over another Sovereign State and this rule is naturally subject to waiver by the consent of the Sovereign who may desire a local adjudication as to his rights in the courts of another Sovereign. It was held in this case that the requisitioning of the *Cristina* under that decree gave the Spanish Government a right or interest in the *Cristina* whether called property or not which was immune from interference by the Courts of this country. In the result it was held that the Court could not issue its process against the ship or the Spanish Government and the contention of the Spanish Government prevailed.

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10. The Arantzazu Mendi

(1939) A. C. 256

HOUSE OF LORDS

(Recognition and Territorial Jurisdiction).

The *Arantzazu Mendi*, a Spanish ship registered at Bilbao was requisitioned by the Republican Government while on the high seas after Bilbao had been captured by insurgent forces. On her arrival at London her owners issued Writ *in rem* for possession. The vessel was arrested by the Admiralty Marshal. Later on, in April 1938, the Nationalist Government with the consent of the owners of the vessel requisitioned the vessel which still was under arrest. Thereupon, the Republican Government applied for a writ *in rem* and the Nationalist Government objected on the ground that the Court had no jurisdiction to implead a foreign State.

The Court made an enquiry from the Foreign Office of His Majesty's Government as to whether it recognised the Nationalist Government of General Franco as a foreign Sovereign State. The foreign office in reply stated that the Nationalist Government of Spain was a Government in conflict with the Government of the Spanish Republic estab-

2. That unless a foreign Sovereign chose to waive his rights when sued, he is not liable to the jurisdiction of the foreign Courts.

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13. Haile Salassie *vs.* Cable And Wireless Ltd.

(1939) CH. 182

COURT OF APPEAL

(State Succession).

Cable and Wireless Ltd. was engaged in running a Radio Telegraphic service between Great Britain and Ethiopia before Italy had conquered Ethiopia. As a result of this contract between the Company and the Government of Ethiopia, certain amount of money became due to the Government of Ethiopia from the Company. After Italy had conquered Ethiopia, Haile Selassie the King Emperor of Ethiopia claimed the money from the Company. The Company thinking money was due to the Italian Government refused to pay pending a judicial decision.

In an action raised by Haile Selassie against the Company, the Court of first instance held that the plaintiff was the *de jure* sovereign of Ethiopia and was entitled to sue for the money. During the pendency of an Appeal preferred by the Defendant, Great Britain granted *de jure* recognition to the King of Italy as Emperor of Ethiopia and this recognition was retrospective in its effect. The Court of Appeal acting on the *de jure* recognition of the King of Italy to be the Emperor of Ethiopia dismissed the action and allowed the Appeal. It was held that the public State property must be treated in the Courts of this country as having become vested in the King of Italy and before the date of the issue of writ in this connection and in this view of the matter Plaintiff's claim was dismissed.

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14. The United States of America *vs.* Mc. Re.

(1869) L. R. 8 Eq. 69

(Succession to Public Property).

This was a Suit for an account brought by the United States Government in England after the dissolution of the Confederate Government which had sent certain goods and some money to the Defendant who was domiciled in England. The Defendant raised no plea and the Plaintiff was left to make

out its title. The Plaintiff declined to recognise the authority of the Confederate Government.

The Court dismissed the suit. It held :—

1. That a Government *de facto* succeeding another succeeded to all the public property of the displaced power and public property of the displaced Government, would vest in the succeeding power. The right to sue for accounts against agent debtor or other persons of the displaced Government would also vest in the Government succeeding it.

2. That the right to which the succeeding Government would be entitled is only a right of succession or representation and it was not a right paramount and it could be enforced in the same way and to the same extent and subject to the same rights and obligations as the displaced authorrity.

3. That the succeeding Power has no right to repudiate that privity which existed between the Defendant and the displaced Government and to claim on the basis of a paramount title.

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15. The Lusitania Case

1923 DECISIONS, MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY, 1925, p. 17.

(*International Torts*)

During the first World War, the Lusitania was without any warning, torpedoed by a German U-boat off the coast of Ireland with the result that 128 American citizens on board the Lusitania were lost. The treaty of Berlin which led to the termination of the War between Germany and the United States provided for the establishment of a Mixed Claims Commission for the purpose of deciding actions for damages arising from the action of the belligerents during the War. A number of claims arising from the sinking of Lusitania were brought before the Commission.

The Commission in giving its opinion held that it was bound by expressed provisions of, and clear implications of the terms of, the treaty and that the treaty provisions were to be so construed as to best conform to accepted principles of International Law, rather than in derogation of them. It was of opinion that in estimating damages, the following factors were to be taken into consideration : (*a*) the age, sex,

health, condition and station in life, occupation, . . . mental and physical capacity, . . . earning capacity and customary earnings of the deceased and the uses made of such earnings by him ; (*b*) the probable duration of the life of the deceased, but for the fatal injury, (*c*) the reasonable probability that the earning capacity . . . would either have increased or decreased, (*e*) the age, sex, health, condition and station in life and probable life expectancy of each of the claimants ; (*f*) neither the physical pain nor the mental anguish which the deceased may have suffered will be considered as element of damage ; (*g*) the amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover ; (*h*) no exemplary, punitive or vindictive damages can be assessed.

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16. Rex *vs.* Godfrey

(1923) 1. K. B. 24

KING'S BENCH

(*Extradition*).

The Applicant was a member of a firm carrying on business in England. Certain other members of that firm while in Switzerland obtained some goods by fraud and disposed them of in England. The Applicant was also charged as a principal offender. Extradition proceedings were taken against the Applicant and he applied for a writ of *Habeas Corpus* on the ground that he was not a fugitive criminal within the meaning of the Extradition Act, inasmuch as he was not in Switzerland and had not fled from Switzerland to England. The Court, however, rejected his application.

Lord Hewart, C. J. observed :—

"In order to see what exactly is the force of (the applicant's) submission it is necessary to look at the definition of 'fugitive criminal' in section 26 of the Act . . . . At the first blush it might appear that when a man is spoken of as a fugitive what is meant is that he has fled from one country to another country. But is that notion in the least degree necessary ? Suppose that a person had gone to another country and because he had committed a crime there has fled to this country. He would in that case be fleeing from the consequences in that other country of what he had done there, and he would clearly be a fugitive criminal. But it seems

to me that these words are equally satisfied whether the man has physically been present in that other country or not, if he committed the crime there. In the one case as in the other he is seeking to escape the penal consequences of his act . . . "

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17. In Re Amand (No. 2)

(1943) A.C. 149

HOUSE OF LORDS

(Territorial Jurisdiction).

The Appellant a Dutch subject had been residing in England for the last 14 years. In 1940, the Queen of the Netherlands promulgated a decree calling upon certain class of Dutch subjects residing in England to register for service in the Dutch military forces. By reason of this decree, the Appellant was liable to return for duty to the Netherland Government. On receiving notice, the Appellant joined the Dutch military forces and served till 1941 when he took leave. The Appellant failed to return to his Dutch military service after the expiry of leave and he was informed by a British Police officer that he was required to return to his duty and if he still failed he was to be arrested and would be handed over to the Dutch Military Police. The Appellant failed to join his service in the Dutch Army and he was arrested upon which he applied for a writ of *Habeas Corpus*. This petition for writ was dismissed by the Divisional Court and the Court of Appeal. Eventually, an Appeal was preferred to the House of Lords which dismissed it.

The House of Lords held :—

1. That the Appellant though a Dutch national is subject to the law of this country and is entitled to its protection and to the privileges which belong to one who lives within the King's Peace that and in particular he is entitled to the rights of personal freedom which English Law gives him including the right to safeguard his liberty by the remedy of *Habeas Corpus*.

2. That under the Land Forces Act of 1940 and the Order in Council, the Appellant has rendered himself liablr to be apprehended on a charge that he is a deserter oo absentee without leave from the Dutch Forces and that the Appellant is subject to Dutch Military Law. He is, therefore, not entitled to any protection by the Government of the United Kingdom.

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18. The case of the 'Virginius'

(1873) Parl. Papers 1874 Vol. LXXVI

SELF-DEFENCE AND ATTRACTIVE JURISDICTION ON THE HIGH SEAS.

(Territorial Waters).

The *Virginius* an American Steamer had been registered in New York. Before 1873, she was owned and employed by the Cuban insurgents. While she was thus engaged in the service of the insurgents, she left Kingston, apparently for Limon Bay but really for the Coast of Cuba. During this voyage on being chased by a Spanish Warship, she went into Port-au-Prince in Hayti. After a short time she began her journey to Cuba and on the open sea she was chased and captured by a Spanish Warship, Tornado. At the time of the capture, she had on board a large quantity of arms and ammunition and a large number of passengers many of whom were going to join the insurgent forces in Cuba, and some of whom were British subjects who had boarded the ship on the ground that it was bound for Costa Rica. The vessel was taken to Santiago de Cuba and the passengers and crew were detained on a charge of piracy and aiding the rebels. Some of her passengers including 16 British subjects and 9 citizens of the United States were tried by Court Martial and were shot. The British Government asserted that the Spanish Government was responsible for all that happened and asked the Spanish Government to stay its hands with regard to the remaining British subjects in its custody. The Spanish Government placed the surviving British subjects at the disposal of the United States Government and ordered the Governor General of Cuba to enquire and report about the incident.

Two questions emerged from this controversy :—

The first was whether the Spanish Government acted properly in summarily trying and executing the British and American subjects found on board the vessel. The second was whether the Spanish Government had any justification for the capture of the vessel on the high seas.

The Spanish Government contended that in view of the objectionable cargo, and the suspicious voyage that had been undertaken by the vessel and the character of the passengers on board the vessel, the vessel and the persons thereon were to be deemed to be engaged in piracy. The case of Great Britain was that there was no good ground for treating this case as a case of piracy *jure gentium* and that even if it was a case of piracy, the treatment which was given to

the passengers was unjustifiable. It further contended that there was no jutification for the summary trial and execution of its subjects.

In the result, the contention of Great Britain was taken to be well founded and the Spanish Government was compelled to make compensation in respect of the British citizens who had been executed. The Spanish Government was also made to make compensation to the United States in respect of the execution of American subjects.

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19. Stoeck *vs.* The Public Trustee

(1921) 2 Ch. 67.

(Nationality.)

Stoeck who had been born in Rhenish Prussia in 1872, went to live in Belgium in 1895. He was deprived of his Prussian nationality in 1896, and thereafter, he neither applied for nor obtained any nationality. In 1896, he went to England, which he made his permanent home but he was not naturalised in England. In 1918, he was deported to Holland whence he returned to Germany. During the first World War, in pursuance of emergency laws, certain property owned by Stoeck was taken over by the Public Trustee. Under the provisions of the Treaty of Versailles, 1919, the Allied and Associated Powers had the right to retain and liquidate the property of German nationals within their territory. On the British Government taking steps for liquidating the property of the German nationals, Stoeck, then residing in Germany, claimed that as he was not a German national his property was not liable to be liquidated under the terms of the Peace Treaty.

The Court held that under the German law Stoeck had lost his German nationality and that he was stateless. It was observed by the Court that it was generally recognised in International Law, that the question as to whether a person is a national of a certain State must ultimately be settled by the Municipal law of the State of which he claims to be a national and that German law recognises statelessness.

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20. U. S. A. *vs.* Rauscher

(1886) 119 U. S. 407

(Extradition).

The prisoner was a mate on board an American vessel. He wrongfully assaulted and inflicted injuries on one Janssen

a member of the Crew. The prisoner under proceedings for extradition, had been surrendered by Great Britain to the United States to be tried for murder. The United States Government put him on trial and the prisoner was found guilty and convicted. On behalf of the prisoner an application was moved that the trial was vitiated and the prisoner was entitled to release on the ground that the Court of United State was not competent to try him for an offence different from that for which he had been surrendered. The Judges of the Circuit Court were not uniform on the question and the matter was taken to the Supreme Court. The Supreme Court of the United States held that a person who had been surrendered in Extradition proceedings could not be tried for an offence different from that for which he had been extradited and that in this particular case, the conviction for an offence different from that for which the prisoner had been extradited was altogether illegal.

The Supreme Court laid down important principles of law :—

1. That apart from Treaty, there existed no obligation on any State to surrender an individual to another State in Extradition proceedings. The question of extradition solely depended on a Treaty of Extradition, although the State has a discretion to make a surrender of an individual on the ground of comity of nations.

2. That the State receiving an offender against its laws from another State on Extradition has no right to try him for an offence for which he has not been extradited.

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21. In re Castioni

QUEEN'S BENCH

(1891) I. Q. B. 149

(Extradition).

Political discontent in the Canton of Ticino in Switzerland resulted in a mob attack against the Municipal palace. Castioni was a member of this mob and in the course of the attack he shot a Member of State Council. Castioni had, prior to this attack, been living in England for a long time and after taking part in the mob rising had returned to England. He was accused of murder and the Swiss Government initiated extradition proceedings. Castioni was committed to prison as his offence did not appear to the Magistrate to be of a political character. Castioni applied for a writ of *Habeas Corpus* which was issued by the Divisional Court.

The Court observed that in order "to exclude extradition for such an act as murder which is one of the extradition offence, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the Government in its hand, before it can be brought within the meanings of the words used in the Act."

It held that "it is clearly made out by the facts of this case that there was something of a very serious character going on . . . amounting to . . . in that small community to a state of War . . . It is quite clear that from the very first (Castioni) was an active party, one of the rebellious party who was acting in the attack against the Government . . . "

The Court further found that Castioni fired the shot thinking that it would advance the cause and that it was an act which was in furtherance of the very object for which the rising had taken place and that Castioni was guilty of an offence of a political character.

22. Savarkar Case

(1911) No. IX

PERMANENT COURT OF ARBITRATION

(Territorial Jurisdiction : Extradition).

Savarkar was being sent to India on board a vessel from England on a charge of abetment of murder. He escaped at Marseilles and was seized by a French Police officer who returned him to the Morea which sailed on the following day. The French Government demanded restitution of Savarkar on the ground that he had been contrary to the rules of International Law, delivered to British officials. The Government of France and Great Britain entered into a compromise whereby the Permanent Court of Arbitration constituted a tribunal for the decision of the question.

The tribunal held that, on the facts of the case, that Savarkar who had taken refuge in a foreign territory had been delivered to the British authorities by those who acted in good faith and that there was nothing in the nature of a violation of the sovereignty of France.

2. That although it was apparent that there had been an irregularity committed in handing over Savarkar to the British Police, there is no rule of International Law imposing

an obligation on the Power which has in its custody the prisoner to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.

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23. R. v. A. B. (Kent)

(1914) 1 K. B. 454 (Sub Nomine R. vs. *KENT)*

(1941) 110 L. J. K. B. 268

COURT OF CRIMINAL APPEAL

(Diplomatic Privilege).

The Appellant was a clerk in the United States Embassy in London. He was dismissed from service on May 21, 1940 when he was arrested for an offence under the Official Secrets Act and for the theft of certain documents. The United States Ambassador at London waived his right to diplomatic privilege. The Appellant claimed diplomatic immunity and pleaded that he could no be tried by the court. His plea was repelled by the first court and he was sentenced to 7 years' imprisonment. He filed an Appeal which too was dismissed.

Before the Court of Appeal it was urged on behalf of the Appellant that he was entitled to diplomatic privilege throughout the whole term of his employment and for a reasonable time thereafter and the waiver by his Ambassador of the right of diplomatic privilege could not disentitle him to the immunity that the law concedes to him. The Court observed : "The privilege is the privilege of the Ambassador and not of the individual, and therefore from the moment of waiver by the Ambassador and a *fortiori* by his Government the privilege ceases. The cloak of the Ambassador no longer covers the individual and the individual then becomes liable to any process of law to which ordinary people are subject. If not, the strange result would follow that a member of an Ambassador's staff who had been dismissed and in respect of whom there had been a waiver of privilege could snap his fingers at the law of the country to which his Ambassador was accredited for an indefinite period called a reasonable time . . . "

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24. Bergmen v. De Sieyes

(1946) 71 F. Supp. 334

DISTRICT COURT, SOUTHERN DISTCIRT OF NEW YORK

(Diplomatic Privilege).

The Defendant, a French Minister accredited to Bolivia, was while passing through New York on his way to Bolivia

served with a Civil process on behalf of the Plaintiff. The Defendant pleaded that he was exempt from Civil jurisdiction. The Court held—

1. "that the Foreign Minister is immune from jurisdiction both criminal and civil of the Courts in the country to which he is accredited on the grounds that he is the representative, the *alter ego* of his sovereign who is, of course. entitled to such immunity and that subjection to the jurisdiction of the Courts would interfere with the performance of his duties as such minister and

2. that "a Foreign Minister *en route* either to or from his post in another country is entitled to innocent passage through a third country and is also entitled on the same grounds, whether as a matter of right or of discretion, to the same immunity from the jurisdiction of the Courts of the third country that he would have if he were resident therein . . ."

In the result the plea of the Defendant was accepted.

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25. In *re* Anglo-Iranian Dispute over the Nationalization of Iran's Oil Industry

INTERNATIONAL COURT OF JUSTICE

(Jurisdiction of International Court of Justice in re interim measures).

Pleas see Chapter XXX at pp. 549

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26. Daimler Company Ltd. *vs.* Continental Tyre and Rubber Co.

(1916) 2 A. C. 307

IN THE HOUSE OF LORDS

(Enemy Character of Corporations)

The Continental Tyre and Rubber Company was incorporated in Great Britain and had its registered office in London. More than 90 o/o of the shares of this Company were held by Germany Co. which carried on the business of manufacturing motor tyres. The rest of the shares except one which was held by the Secretary of this Company stood in the name of some German nationals. Three of the four Directors of this Company were residing in Germany when the War broke out and the fourth Director who had been living in England went away to Germany on the outbreak of the War. The business of this Company consisted in selling in England motor tyres

manufactured by the German Company which held the largest number of shares in this Company.

The Continental Tyre and Rubber Company raised an action in respect of money due from the appellant, the Daimler Company Ltd. The appellant pleaded that the Plaintiff Co. and its officers were alien enemies who were incapable of instituting a suit and that because of the operation of the Trading with the Enemy Act of 1914 the Appellant Company was precluded from making the payment. The Court of the first instance and the Court of Appeal gave judgment in favour of the plaintiff. But the House of Lords held that the action was quite irregular and dismissed the Suit.

This case is an authority on the law relating to enemy character of a corporation. Lord Parker in delivering the judgment of the House of Lords laid down the following propositions of the law :

1. "The Company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience . . . It can be neither loyal or disloyal. It can be neither friend nor enemy."

2. "Such a Company can only act through agents properly authorised, and so long as it is carrying on business in this country through agents so authorised and residing in this or a friendly country it is *prima facie* to be regarded as a friend, and all His Majesty's legies may deal with it as such."

3. "Such a Company, however, may assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs whether authorised or not, are resident in an enemy country, or wherever resident are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the Company in such a case is trading with the enemy."

4. "The character of individual shareholders cannot of itself affect the character of the Company . . . The enemy character of the individual shareholders and their conduct may however be very material on the question whether the Company's agents or the persons in *de facto* control of its affairs are in fact adhering to, taking instructions from or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings."

5. "In a similar way a Company registered in the United Kingdom carrying on business in a neutral country through agents properly authorised and resident here or in the neu-

tral country, is *prima facie* to be regarded as a friend but may through its agents or persons in *de facto* control of its affairs, assume an enemy character."

6. "A Company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy."

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27. The Stigstad

(1919) A. C. 279

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(Neutrality : Property in War at Sea).

The Stigstad, a Norwegian vessel, was carrying cargo of iron ore briquettes, belonging to neutrals from a Norwegian Port to Rotterdam. During her voyage, she was stopped by a British vessel and was taken to Leith and sent to Middlesbrough for discharge. It was admitted that the cargo was really intended to be taken to Germany. The Appellant claimed damages for detention and expenses consequent upon the seizure and the discharge. As the cargo was by agreement sold, the sale-proceeds were allowed to the appellant. The claim for detention and special expenses was disallowed and hence an appeal was preferred.

Before the Court it was contended that the Reprisals Order in Council of March 11, 1915, was invalid and the Appellant was entitled to damages for detention and special expenses. The Reprisals Order in Council provided that every merchant vessel carrying on goods belonging to the enemy or having enemy destination on her way to a port other than a German port may be required to discharge its cargo in a British or Allied port. It further provided that any goods so discharged unless they were contraband of War, shall be restored by order, of the Court upon such terms as the Court might in the circumstances deem just and proper. The Court accepted the following principle laid down in the case of the Zamora :—

"Where there is just cause for retaliation, neutrals may, by law of Nations, be required to submit to inconvenience from the act of belligerent Power greater in degree than would be justified had no just cause for retaliation arisen . . . An order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists and will have due weight as showing what in the opinion of His Majesty's advisers are the best or only means

of meeting the emergency ; but this will not preclude the right of any party aggrieved to contend or the right of the Court to hold that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable considering all the circumstances of the case."

The House of Lords held :

That the Order in Council did not inflict hardship was not excessive either in kind or degree upon neutral commerce. The claim for damages for unlawful interference with the completion of the chartered voyage was not sustainable. The Appeal was therefore dismissed.

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28. The Eliza Ann

THE HIGH COURT OF ADMIRALTY

(1813) 1. Dods 244

On the capture of three American ships by Vigo a British ship of Wàr in Hanoe Bay in August 1812, a claim was made by the United States on the ground that the capture of its ships within one mile of the Swedish mainland was illegal and was in violation of the territory and jurisdiction of the King of Sweden. The ships and their cargoes were both condemned.

The Court held that in order to give validity to this claim it was necessary to show that the capture took place within Swedish territory and that Hanoe had been taken possession of by a British force. It was further held that the fact that the place of capture was in the vicinity of the mainland of Sweden could not alter the position. About the treaty of Peace, the Court observed as follows :—

" . . . Treaty of Peace . . . is an agreement to waive all discussion concerning the respective rights of the parties and to bury in oblivion all the original causes of the War. It is an explanation of the nature that peace and good understanding which is to take place between the two countries whenever that event shall be happily accomplished . . . I am of opinion therefore, that the ratification is the point from which the treaty must take effect."

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29. Curran *vs.* City of New York.

(1947) 191 M. 229

THE SUPREME COURT OF NEW YORK,

QUEEN'S COUNTRY

(Immunity of the U. N. from payment of taxes at its Headquarters)

The City of New York had made a free grant of lands and

ıasements to the United Nations for building its Headquarters. ·ot also made an allocation of certain funds for the widening of the streets of that area and allowed exemption from taxation of the site. The Plaintiff raised an action to set aside the grants made by the City of New York and the Secretary General of the United Nations was constituted as a defendant. The Court dismissed the action. The Court held that the *United Nations and its Secretary General are exempt from judicial process by virtue of the provisions of the Charter of the United Nations* to which the United States was a party.

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30. Kramer *vs.* Attorney General

(1923) A C. 528

HOUSE OF LORDS

(Double Nationality).

Kramer was born of a German father in York Shire in 1867. While Kramer was yet an infant, his father obtained a German nationality both for himself and his infant son, the appellant. Kramer, lived and got his schooling in Germany and later on he joined the German Army. After his discharge from the Army, he settled in Siam and got himself registered with the German Consulate there. When the First World War broke out, he was arrested and was sent to India where he was interned. Thereafter he was sent to Germany. Kramer had some property in the United Kingdom and he raised an action for a declaration that his property was not liable to be liquidated by the British Government in pursuance of Article 297 of the Treaty of Versailles of 1919.

This claim was dismissed and so was his Appeal. The matter was ultimately brought to the House of Lords which maintained the decree of the Court below.

It was contended on behalf of Kramer that inasmuch as Kramer was born in England he was a British subject and although he was also a German national he could not be held to be merely a German national within the meaning of Article 297 and therefore his property situate in the United Kingdom was not subject to liquidation by the British Government. The Court accepted the argument that the Appellant Kramer was a person of dual nationality, but it held that on a proper construction of Article 297 of the Treaty of Varsailles, it could not be held that Germany in agreeing to a charge on the property of its own nationals situate in the territories of the Allied-Powers it stipulated for an exception in favour of those persons who are also subjects of those Powers and that it was not

possible to find any intention of such an exception on the language of that Article. The Court was of the opinion that the appellant was a German national, within the meaning of Art. 297 of the Treaty of Versailles.

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31. The Schooner Exchange *vs.* M'Fadon

(1812) 7 CRANCH 116

SUPREME COURT OF THE UNITED STATES

(Territorial and personal Jurisdiction).

In this case an American citizen prayed for the restitution of the vessel Exchange on the ground that he was the owner of the vessel which was then lying at Philadelphia. The vessel Exchange during her voyage from Baltimore to Spain had been seized under decrees issued by Napolean in 1810. It was alleged that there has been no adjudication about this vessel by any competent Court and that the owner was entitled to its possession. On behalf of the United States Attorney for the Districts of Pennsylvania it was suggested that inasmuch as there was peace between the United States and France, French public vessels could enter American Ports without interference. The District Court rejected the claim. But the Circuit Court, allowed it. The Supreme Court of the United States reversed the judgment of the Circuit Court and restored that of the District Court.

Marshall C. J. in delivering the judgment laid down the following principles :

1. That "the national ships of War entering the port of a friendly Power open for their reception are to be considered as exempted by the consent of that Power from its jurisdiction."

2. That "a Public armed ship constitutes a part of the Military force of her nation ; acts under the immediate and direct command of the Sovereign ; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity."

3. That "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a dimunition of its sovereignty to the extent of the restriotion and an investment of that sovereignty to the same extent in that

Power which could impose such restriction. All exceptions therefore to the full und complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

In this case, it was held that the Exchange was a public armed ship in the service of a Foreign Sovereign with whom the United States was at Peace and it must be construed that it had come into American territory under an implied promise that while necessarily within it and demeaning herself in a friendly manner, she would be exempt from the jurisdiction of the country.

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32. De Haber *vs.* The Queen of Portugal

(1851) 17 Q. B. 171
QUEEN S BENCH
(Immunities under International Law)

The Plaintiff in this case made a claim in Mayor's Court of London to recover an amount of money from the Queen of Portugal. The Plaintiff alleged that the money belonged to him and was with his banker in Portugal that it had been paid to the Government of Portugal under a decree of a Portuguese Court. The defendant in this case applied for a Writ of prohibition calling upon the Court not to proceed with the case. The Writ of prohibition was directed to be issued.

The question before the Court was whether the Court of the Lord Mayor of London had exceeded its jurisdiction in entertaining the claim. The Court held that an action could not be maintained in any English Court against foreign potentate for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head and that no English Court had jursidiction to entertain any complaint against him in that capacity. It further held that the present action against the Queen of Portugal in her public capacity was contrary to law of nations and was not entertainable by the Lord Mayor's Court and that in view of the fact that the Court of Lord Mayor had acted in excess of its jurisdiction a Writ of Prohibition can properly be issued.

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33. Rose *vs.* the King

(1947) 3 D. L. R. 618
QUEBEC COURT OF KING'S BENCH
(Immunities under International Law)

Rose who was a member of the Canadian House of Com-

mons was charged for conspiring with a party of Soviet Spies, to commit offence against the Official Secret Act. Some documents from the files of the Soviet Military Attache in Canada which had been removed were put in evidence by the prosecution. Rose was found guilty and convicted. His Appeal was also dismissed.

The main question that was raised in this Appeal was whether Gouzenko an employee of the Soviet Embassy was exempt from the process of the Canadian Courts and whether his evidence which had been taken by trial court had been legally received.

The Court held :

1. "The first duty of a diplomatic agent is to respect the security of the State. The diplomatic agent and his personnel cannot be summoned to Court but any measure to prevent them from injuring it can be taken ; surrounding and closing in upon the Embassy requiring the turning over to the authorities of any guilty personwho seeks asylum, seizing and arresting any courier documents, plans, photographs, reports etc., the moment the State is certain that its safety is in peril."

2. "If documents seized are then turned over to a Court of Justice for the prosecution of a crime committed by one of the citizens of the country, the Courts cannot give effect to immunity, cannot counteract the decision of the executive of the country, cannot exercise competence in a field, upon a matter exclusively governed by the rule of external Sovereignty that is to say from the absolute and exclusive authority of the State to condition and determine its own relations with other States."

3. "I believe that diplomatic immunity is relative that Courts must give effect to it and accord its advantage to every diplomatic agent who claims it ; that the privilege of taking advantage of the immunity of a foreign State cannot be admitted for a Canadian citizen in litigation between his government and himself when he is not part of a foreign diplomatic corps ; to impose through a judicial decision immunity upon a State which does not claim any would be casting a slur upon its dignity, its sovereignty and through a gesture as ungracious as unexpected would elevate a simple suit to a degree of international importance and create at least in theory a diplomatic conflict contrary to the will of the executive power itself."

In this case the Court held that the evidence of Gouzenko could be given and submitted to the Jury without transgressing any rule of International Law and that such evidence was legal."

34. The S. S. Wimbledon

(1923) Series A, No. 1.

PERMANENT COURT OF INTERNATIONAL JUSTICE

(Territorial Jurisdiction.)

The Wimbledon, a British vessel chartered by a French Company on March 21, 1921 was not allowed by German authorities to pass through the Kiel Canal which had been left under Art. 380 of the Treaty of Versailles free and open to the vessels of Commerce of all nations at Peace with Germany on terms of entire equality. The German Government maintained that as the vessel was carrying military materials to Poland which was then at War with Russia, the passage of the vessel was contrary to German Neutrality Regulations. The principal Allied Powers complained that Germany had broken the Treaty obligations and claimed compensation for the wrong done.

The question whether German authorities were justified in refusing passage through the Keil canal to the S. S. Wimbledon depended upon the interpretation of Article 380 of the Treaty of Peace which ran as follows: "The Keil canal and its approaches shall be maintained free and open to the vessels of Commerce and of War of all nations at peace with Germany on terms of entire equality..."

The Court held that by reason of the above Article the Keil canal ceased to be an internal and national navigable waterway and that it had become an international waterway for the benefit of all nations of the World.

The Court observed that Art. 380 of the Treaty of Peace placed a restriction on the exercise of sovereign rights which Germany possessed over the Keil Canal. In the opinion of the Court, the German neutrality Regulations could not prevail over the provisions of the Treaty of Peace and Germany not only did not in consequence of her neutrality incur the obligation to prohibit a passage to Wimbledon through the Keil Canal, but on the contrary was entitled to permit it. The Court further held that Germany could not advance her neutrality orders against the obligations which she had accepted under this Article and that Germany was perfectly free to regulate her neutrality in the Russo-Polish War subject to the condition that she respected and maintained intact the contractual obligations which she entered into at Versailles.

In the result Germany was held liable to pay compensation.

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35. Rothschild *vs.* Administrator of Austrian Property

CHANCERY DIVISION

(1923) 2 C. H. 549

(Nationality).

The Plaintiff who was a national of the former Austro-Hungarian Empire was granted the citizenship of Czechoslovak on July 9, 1920 before the Peace treaty with Austria came into effect. The Plaintiff therefore alleged that inasmuch as he was no national of the former Austrian Empire, his property in Great Britain was not liable to be liquidated under the provisions of the Treaty of Peace which came into effect on July 20, 1920. The Plaintiff, therefore, claimed a declaration to that effect. The Court, however, dismissed the claim. The Court on a construction of Art. 249 Clause (b) and Art. 230 of the Treaty of Peace came to the conclusion that even if the Plaintiff acquired Czechoslovak nationality he still remained a national of the former Austrian Empire and was not within the exception of paragraph 3 and his property was, therefore, liable to be dealt with under the terms of the Treaty of Peace.

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36. The I'm Alone

(1933 : 1935) 3 Reports of International Arbitral Awards Page 1609

CANADA UNITED STATES ; SPECIAL JOINT COMMISSION

(Territorial Jurisdiction).

Certain American Citizens interested in smuggling of Liquor into United States owned and controlled a Canadian vessel 'I'm alone.' The vessel used to bring liquor from British Honduras to ports in Gulf of Mexico. From Gulf of Mexico small boats used to smuggle into United States the liquor thus brought by 'I'm alone'. While 'I'm alone' was within 12 miles of the Louisiana coast, she was hailed by the American Coast Guard patrol vessel Wolcott. 'I'm alone' was fired at but she continued her voyage and was pursued by Wolcott. A little later, Wolcott was joined by another patrol boat Dexter which fired at 'I'm alone' with the result that 'I'm alone' was sunk and one of her crew lost. Under the Convention of 1924, the Commission was appointed to go into the question. In their final report, the Commissioners found that the sinking was an unlawful act and the United States was responsible for damages.

The Commissioners had held that the sinking of the suspected vessel was not justified by anything contained in the

the Convention of 1924, that 'I' am alone' "although a British ship of Canadian registry was *de facto* owned, controlled and at the critical times managed and her movements directed and her cargo dealt with and disposed of, by a group of persons who were entirely or nearly so citizens of the United States," and that "the act of the sinking of the ship by the officers of the United States Coast Guard was an unlawful act." Although the Commissioners held that no compensation be paid in respect of the loss of the ship or the cargo, they considered that the United States ought formally to acknowledge its illegality and to apologise to His Majesty's Canadian Government therefor and further that as a material amend United States should pay the sum of Dollar 25,000 to His Majesty's Canadian Government.

37. The Amazone

(1939)- P. 322, (1940 P. 40)

PROBATE DIVISION AND COURT OF APPEAL

(Territorial Jurisdiction)

The title to the Yacht Amazone was in dispute in this case. The wife of the Belgian Assistant Military Attache contended that the Yacht had been purchased with her money and that her husband dealt with it as her agent, while the husband *i. e.* the Belgian Assistant Military Attache claimed the vessel to be owned by him. The wife applied for a writ *in rem* for possession against her husband who pleaded that he was immune from the jurisdiction of the Court and that the Yacht was his and was in his possession. Both the Courts refused the writ. The Court of first instance held that the Defendant did enjoy full diplomatic immunity and he had such possession of the Yacht as would render it necessary for some legal process to take effect in order to deprive him of that possession.

The Court of Appeal held that the Defendant was a person coming within the privilege of the Embassy and was entitled to claim immunity.

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38. Hirote *v.* Mac. Arthur

(1948) 335 U. S. 876

UNITED STATES SUPREME COURT

(Jurisdiction over Military Tribunals).

General Mac. Arthur, the Supreme Commander of the Allied Powers, by a proclamation constituted an International Military Tribunal for the trial of the major War Criminals

of the Far East. The trial that was held before the Tribunal is well known as the Tokyo trial in which a number of accused were found guilty and sentenced. Some of these convicted persons applied to the United States Supreme Court for Writs of Habeas Corpus on the ground that the whole trial was illegal.

The Supreme Court held that the Tokyo Tribunal having been set up by General Mac. Arthur as the Agent of Allied Powers in the Far East was not a Tribunal of the United States and therefore the Courts of the United States had no power or authority to review, to confirm, set aside or annul the judgment and sentence imposed on the Petitioners.

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39. Sei Fujii *v.* State of California

(1950) LOS ANGELES DAILY JOURNAL, April 25, 1950)

DISTRICT COUTR OF APPEAL CALIFORNIA

(International and Municipal Law).

The Plaintiff was by birth a Japanese but since 1913 had been continually residing in the United States. The Plaintiff, however, did not acquire a citizenship of the United States. In 1948, the Plaintiff purchased some property in California against the provisions of the California Alien Land Law of 1920 which prohibited acquisition of property in the State of California by a person ineligible for naturalisation as a United States citizen. The Court of First Instance held that the Plaintiff was disqualified from holding the property.

Before the Court of Appeal, it was contended on behalf of the Plaintiff that the California Alien Land Law was in violation of the Constitution of the United States inasmuch as it provided for an arbitrary discrimination and that, at any rate, the statute was inconsistent with the declared principles and spirit of the United Nations Charter. The Court held that although the constitutionality of the Alien Land Laws had been subject of attack for nearly 30 years, the statutes had been held to be valid. It further held that the United Nations Charter was the Supreme Law of the land and that the restrictions contained in the Alien Land Law were in direct conflict with the plain terms of the Charter and the purpose announced therein by its premiers. The Court observed that such a discrimination as is found in the Alien Land Law against people of one race was contrary both to the letter and the spirit of the Charter which is a Treaty and is paramount to every law of every State in conflict with it.

40. International States of South-West Africa (July 11, 1950)

I. E. J. REPAIRS 1950, p. 79

(*Mandated Territory*).

Please see Chapter XXVI "International Court of Justice" at pp. 317—318.

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41. The Orozembo

(*1907*) *6 C. Rob. 430*

(*Unneutral Service*).

In this case an American vessel had on its board 3 senior military officers and two civil servants in the Government of Batavia along with their servants which was seized on its way to Batavia on the ground that the vessel was in the enemy's service. The officers on board the ship were proceeding to Batavia under the orders of the Government of Holland. This captor brought the vessel before the Court and sought its condemnation. The Court held that the vessel was engaged in the transport service of the enemy and was liable to condemnation.

Sir William Scott who delivered the judgment in this case relied upon the case of 'The Friendship' and held that a vessel let out for a purpos so intimately connected with the hostile operations as the transport of military officials is to be considered as a transport subject to condemnation.

The plea that the Master was ignorant of the service on which the vessel was engaged was repelled by the Court. The Court further held that in order to support the penalty it was not necessary that there should be some proof of delinquency in the master or the owner of the ship. It observed : 'It will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found.......If the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done or at least repeated by enforcing the penalty of confiscation.'

This case laid down the principle that the carrying on of military persons to the calling of an enemy who are there to take on them the exercise of their military functions will lead to condemnation and the Court is not to scan with minute arithmatic the number of persons that are so carried and that if it is of sufficient importance to the Government of the enemy to send those persons, it must be enough to put the

adverse Government on the exercise of their right of prevention and the ignorance of the Master can afford no ground of exculpation in favour of the Owner.

42. The Case of the Caroline

MOORE, DIGEST II §179-217

Dectrne of Self defence).

In 1838, a body of insurgents armed and organised in American territory occupied a small island on the American side of the Niagra River. These insurgents boarded the ship Caroline for the purpose of attacking the British Territory. The insurgents, however, did not succeed in carrying out their plan and having changed their mind altered the course of the ship and sailed to the United States side of the River. The British officers inspite of this change in the direction of the Caroline attacked the vessel and brought it under its control.

The United States Government protested against the action of the British forces and asserted that there was nothing in the interest of self defence and the action of the British forces was in violation of their territory. The British Government, on the other hand, complained that the United States Government in permitting the insurgents to arm and organise on its territory and thus had endangered the saf-ty of Canada and that the attack by the British forces was necessitated by a desire of self preservation. This controversy between the two Governments continued for a long time and the matter was at last amicably settled. The British Government maintained that the necessity which forced its forces to attack the Caroline was such as left no choice of means and there was no time for deliberation and further that nothing was done which was in excess of what the necessity of the occasion required. The British Government, further expressed its regret for what was done and the United States Government accepted the explanation.

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43. The Lena

Repairs in Neutral Country).

The Lena was a Russian Cruiser which was during the Russo-Japanese War engaged in raiding the Japanese commerce in the Pacific. During her defence vessel Lena became damaged and she had to enter the American port of San Francisco for repairs. The Japanese Government lodged protest against the action of the American Government in giving a shelter to the Lena for necessary repairs.

The question in controversy was whether the American Government was justified in allowing the vessel to enter her ports for the purpose of reprairs. But before this controversy could be resolved the Commander of the vessel agreed that the vessel may be interned and the result was that the vessel was kept in the American port for the period during which War went on.

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44. The Altmark

HACKWORTH DIGEST, VII 568

(Neutrality).

On February 16, 1940, the German Cruiser Transport vessel, the Altmark which had on its board about 300 British Officers and men belonging to various British merchant ships which had been sunk by the Graf Spee, was sailing through the Norwegian Territorial waters. While the Altmark was in the Norwegian Territorial waters, it was attacked by a British Cruiser which recovered the prisoners from the Altmark. The Norwegian Government lodged a protest on the ground that the action of the British Cruiser had the effect of violating its neutrlity. The British Government replied that inasmuch as the Altmark carried prisoners it had no right to pass through the Territorial waters and that the Norwe ian Government had failed in its duty to search the Altmark when requested. The Norwegian Government made a Rejoinder to the effect that the Altmark was a war ship and enjoyed immunity from visit and search and that there was nothing in the International Law which prohibited a belligerent vessel with prisoners from having a free passage through neutral territory.

45. Case concerning the rights of Nationals of the United States of America in Morocco (1950).

INTERNATIONAL COURT OF JUSTICE

This case was brought before the International Court of Justice by the French Republic against the United States of America. The French Government sought a declaration to the effect that the Nationals of the United States in Morocco were not entitled to any preferential treatment and were subject to the laws and regulations in force in Morocco, in particular, those relating to imports not involving an official allocation of currency.

The Government of the United States raised a preliminary objection on the ground that discrimination in favour of French imports was in violation of the treaty rights of the

United States and that the provisions of the Residential Decree of December 30, 1948 if applied to United States citizens violated International Law. It was contended that the Act of Algeciras of 1906 guaranteed economic liberty without any inequality in French Morocco and this guarantee remained unaffected by the Treaty of March 30, 1912 under the terms of which French Protectorate over Morocco was established.

The Court unanimously held that the Residential Decree of December 30, 1948 was discriminating in its nature inasmuch as it exempted France from control of imports without allocation of currency and subjects the United States to such control. The Court further held that the rights which were conferred on the United States by the Act of Algeciras could not be taken away by the Residential Decree of December 30, 1948.

Another question that was raised on behalf of the United States was that the Nationals of the United States were under the Treaty of 1836 between the United States and Morocco entitled to have the cases to which they were parties heard by the United States Consular Courts in the French Zone of Morocco. It was contended that France was bound by the Treaty which provided for decision by the Consul of any dispute to which the national of the United States was a party and that the Treaty had not been terminated by the establishment of the French Protectorate over Morocco. The Act of Algeciras was also cited as supporting this right.

The International Court of Justice held that certain provisions of the Act of Algeciras did allow a limited consular jurisdiction over matters specified therein. The Court further held that consular jurisdiction had not been taken away for the purpose of giving effect to the provisions of the Act. The Court was thus of the opinion that the nationals of the United States were entitled to invoke the jurisdiction of the Consular Courts in matters provided for by the Act.

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46. Anglo-Norwegian Fisheries Case, (1949).

INTERNATIONAL COURT OF JUSTICE

The United Kingdom brought this case before the International Court of Justice complaining of the closing of considerable areas of the Norwegian coast for fishing vessels of foreign States. The United Kingdom maintained that those areas formed part of the high seas and must be open for fishing vessels of all nations. The United Kingdom asked the Court to define the limits within which Norway was entitled to reserve a fisheries zone. The United Kingdom further claim-

ed damages for loss suffered by it on account of the interference in its fishing outside these limits.

The Court by a vote of 10 to 2 held that the decree for the limitation of the zones was not contrary to the rules of International Law. It further held by a vote of 8 to 4 that the base lines fixed by Norway were correct on principle.

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47. Colombian Peruvian Asylum case, (1951).

INTERNANIONAL COURT OF JUSTICE

The Repulic of Colombia by an agreement with the Peruvian Government submitted this case to the International Court of Justice on October 15, 1949.

The Peruvian Government launched prosecution against one Victor Raul Haya de la Torre, leader of the American People's Revolutionary Party for raising and directing a rebellion. Victor Raul Haya de la Torre, on January 3, 1949 sought and was granted asylum in Colombian Embassy in Lima. Thereafter the Colombian Ambassador asked the Peruvian Government to guarantee safe-conduct of Victor Raul Haya de la Torre. The Colombian Ambassador maintained that the accused had been 'qualified' as a political refugee. The Peruvian Government did not agree with the views of the Colombian Ambassador and refused to grant a safe-conduct. By an agreement between the two countries the case was taken to the International Court of Justice, as stated above.

The first question that arose for the decision of the Court was, whether the decison of the Colombian Ambassador that the accused had been qualified as a political refugee was binding on the Peruvian Government. The Court held that the State granting asylum could not bind the Peruvian Government by its decision with regard to the qualification of the accused as a political refugee.

The second question raised was, whether the Peruvian Government was bound to grant a safe-conduct to enable the accused to leave the country. The Court was "not entitled to claim that the Peruvian Government should give the guarantees necessary for the safe departure of Haya de la Torre, from tne country with due regard to the inviolability of his person." The Court held that this case did not come within the guarantees mentioned in the Havana Convention which applied only to a case where the territorial State demanded the departure of the refugee from its territory.

The third question was whether the Colombian Ambassador was justified in granting asylum to the accused. The

Court referred to the provisions of the Havana Convention under which an asylum could be granted only when there was urgency and when the persons seeking asylum were not accused of a common crime and came to the conclusion that there was no urgency of granting the asylum and that Haya de la Torre was not accused of a common crime. The grant of asylum by the Colombian Ambassador was thus held to be not in conformity with the Havana Convention.

Haya de La Torre case.—After the delivery of the aforesaid judgment the Colombian Government made a request to the Court to give an interpretation of its judgment and asked for answers to some questions. The Court refused the prayer for interpretation. Thereafter the Peruvian Government asked the Colombian Government to hand over Haya de la Torre to it. The Colombian Government maintained that it was not bound to surrender the accused. On December 13, 1950 the Colombian Government made an application to the International Court of Justice seeking decision of the question whether it was bound to deliver Haya de la Torre to the Peruvian Government in compliance with the Court's judgment of November 20, 1950 or in accordance with the law in force between the parties and particularly American International Law.

The Peruvian Government requested the Court to declare that the asylum granted by the Colombian Government had ceased on the pronouncement by the Court of its judgment on November 20, 1950 and to order the asylum to cease forthwith to enable the Peruvian justice to take its normal course.

The Court was of the opinion that according to the judgment of November 20, 1950, Haya de la Torre was not accused of a common crime and Colombian Government was not bound to surrender him to the Peruvian Government. The Court observed that an objection to surrender a person, accused of a political crime would imply an assistance in prosecution of a political offender and that such an objection could not be spelled out from the terms of the Havana Convention.

The Court also held that the Peruvian Government was entitled to ask Colombia to terminate the asylum. The Court however refused to ask Colombia to terminate the asylum by handing over Haya de la Torre to the Peruvian Government on the ground that its judicial function did not extend to order the termination of the asylum in a particular manner *viz.*, by surrendering the accused. The Court declared that the asylum ceased on the pronouncement of the judgment of November 20, 1950.

48. Republic of Haiti *v.* Plesch and Societe Haitienne de Banque et de Placement.

NEW YORK SUPREME COURT

(73 N. Y. S. 2d. 645.)

The Republic of Haiti brought an action for a declaration to the effect that it was entitled to certain securities which formerly belonged to the defendants, Plesch and Societe Haitienne de Banque et de Placement (hereinafter called Sotta) and which had been nationalised by decrees of the plaintiff Republic. The plaintiff alleged that it was in possession of those securities but that the defendants asserted their title over them.

The defendants denied the claim of the plaintiff and asserted their title to the securities mentioned in the plaint. They further put forth a cross claim to certain other securities on the ground that they were the owner but that the plaintiff asserted its claim in respect of them.

The plaintiff applied for dismissal of the cross claim of the defendants on the ground that the defendants could not make a counter-claim against a sovereign State which the plaintiff undoubtedly was.

The question before the Court was whether such a counter claim against a sovereign State could be pleaded.

The Court was of the opinion that a sovereign State enjoyed an immunity so that the courts of the United States could not adjudicate upon any controversy to which a sovereign State was a party. The court held that by commencing an action in the courts of the United States the foreign sovereign State could not be held to have waived its immunity so as to entitle any of the parties to the action to plead a counter claim against it. The Court was of the view that in so far as the counter claim related to the property in respect of which the foreign sovereign State commenced the action the courts of the United States were competent to decide but they will have no jurisdiction to adjudicate in respect of that property which was not the subject matter of the action. Thus the counter claim with regard to securities other than those in respect of which the Republic of Haiti had brought the action was not entertained.

The motion to dismiss the counter claim with regard to securities not mentioned in the action was granted.

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49. Republic of Mexico *v.* Hoffman.

UNITED STATES SUPREME COURT

(324 U. S. 30)

This was an action *in rem* brought by the owner and master of the Lottie Carson, an American vessel against the Baja California for damages suffered by it on account of collision which took place in Mexican waters. It was alleged by the plaintiff that the collision was due to the negligence of Baja California.

The Mexican Ambassador to the United States took the plea that Baja California was at the time of its seizure owned by the Republic of Mexico, and was engaged in the transportation of the cargoes between the Mexican and other ports.

On behalf of the United States it was accepted as true that Baja California was the property of the Mexican Government.

The District Court held that Baja California was in possession, operation and control of the Compania Mexicana de Navigacion del Pacifico which was a privately owned corporation doing business in transporting cargoes. It further held that the collision was due to the negligence of the Baja California. The plaintiff was granted a decree for damages.

The Circuit Court of Appeals affirmed the judgment of the District Court and held that although Baja California was the property of the Mexican Government it was in possession and control of the privately owned corporation and therefore no immunity attached to it.

The Supreme Court affirmed the findings of the Court below and came to the conclusion that Baja California was given to the privately owned corporation by the Mexican Government for a period of five years and its crew and officers were selected by the corporation. The Court held that although the title vested in the Mexican Government, the possession and control of the vessel was with the corporation. The Court emphasized the fact that the immunity is to be granted to the vessel not on the ground of the title but on the ground of possession and the control.

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50. R. *v.* Bottrill, Ex. parte Kuechen meister

COURT OF APPEAL

(1947) 1 K. B. 41.

The appellant, a German national obtained permission in 193 1 to reside permanently in England. He applied in May

1939, for British nationality. The British Govt., ordered him to leave England in August 1939. He went to Eire and while there he was asked to come back to England to appear before an Advisory Committee on the question of his internment. Thereafter he was sent to Australia but was again brought back to England in 1945 and was put in an Internment Camp. On the termination of hostilities and after unconditional surrender of Germany in June, 1945 he applied for a writ of *Habeas Corpus*.

The important questions that arose in the case were :—(1) Whether England was still in a state of war with Germany even after the cessation of hostilities ; (2) whether the appellant as an alien enemy had any right to writ of *Habeas Corpus* against the Crown.

The Secretary of State for foreign affairs gave a certificate to the following effect:—(1) That under para 5 of the Preamble to the Declaration of June 5, 1945 of the unconditional surrender of Germany the Governments of United Kingdom, the States of America, The Union of Socialist Soviet Republic and France assumed supreme authority with respect to Germany. There had been no annexation of Germany; (2) That Germany was still a State and there also existed German nationality though the Govt. of Germany was carried on by the Allied Control Commission ; (3) There had been no treaty of peace and the state of war had not come to an end. The British Govt., was still in a state of war with Germany although there were no active hostilities going on.

Decision.—The Court of Appeal held that the certificate of the Secretary of State for foreign affairs saying that England was still at war with Germany was binding on all Municipal Courts of the Country. It was therefore held that the appellant remained an alien enemy and was not entitled to a writ. The Court observed : "The King under our Constitution, is under no obligation to admit into the United Kingdom, or to retain here when admitted, any alien. Every alien in the United Kingdom is here only because his presence has been licensed by the King. It follows that at Common Law the King can at will withdraw his license and cause the executive to expel the alien.........even an alien enemy may live here in perfect freedom under the King's license.......................but on withdrawing that license the King may intern or expel the alien enemy."

The Court was of the opinion that a writ of *Habeas Corpus* did not lie against the Crown at the instance of an alien enemy interned for the safety of the realm in time of war by an order of the executive acting on behalf of the King.

51. R. *v.* Ketter

COURT OF CRIMINAL APPEAL

(1940) I K. B. 787.

It was admitted that the appellant who was born in 1911 in Palestine was a Turkish subject till 1923. The appellant had been residing in Palestine upto 1937 in which year he came to England with a passport issued by the British High Commissioner in Palestine. He was allowed to remain in England for a limited time. Thereafter he got an extension of time to be in England. In September 1938, he was ordered to leave England. The appellant, inspite of this order, did not leave England with the result that he was imprisoned to be deported. He filed an appeal that he was not an alien but a British subject. His appeal was dismissed.

The Court of Criminal Appeal held :—

(1) That the onus of proving that he is not an alien lies on the person charged.

(2) That the British passport issued by the British High Commissioner in Palestine could not have the effect of giving the appellant a British nationality.

(3) According to the Palestine Citizenship Order, 1925 which provided that Turkish subjects habitually resident in the territory of Palestine on 1st August 1925 would become Palestinian citizens, the appellant was a Palestinian citizen and did not become a British subject.

(4) That the appellant was not a British subject within the meaning of British Nationality and Status of Aliens Act, 1914 but an alien.

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52. The Corfu Channel Case (Merits), (1949).

INTERNATIONAL COURT OF JUSTICE

(1 C. J. Reports, 1949, p. 4)

The Corfu Channel is situated between Albania and Greece. It is a connecting waterway between the Albanian and the Adriatic Seas. In October 1944 this Channel was swept by the British Navy and no mines were found in it Thereafter it was announced that it was a safe route. In 1945 it was again swept; still no mines were found there. In May 1946, British warships passed through the Channel safely. But in October 1946 two British warships passing through the Channel within Albanian territorial waters stuck contact mines which caused damage to the vessels and loss of lives among the crews. After this explosion the British Navy in November 1946 without the consent of Albania again swept the channel and found a newly laid field of anchored mines at the place where the incident of October 1946 had taken place. The United

Kingdom charged Albania with the responsibility and took the matter to the Security Council which recommended a reference of this dispute to the International Court of Justice.

On the above recommendation Great Britain submitted an application to the Registrar of the International Court of Justice under Art. 40, Paragraph I, of the Statute of the International Court of Justice. Albania objected to this procedure on the ground that the recommendation of the Security Council required an agreement of the two parties for submission of the matter to the Court. Subject to this objection Albania offered to appear before the Court.

This preliminary objection was over-ruled on the finding that the recommendation of the Security Council did not require a joint action and the proceedings were quite regular.

On the merits the International Court of Justice recorded the following findings :—

(1) That the two British warships were mined in Albanian territorial waters in a previously swept and check-swept channel at the point where newly laid minefield was found in November 1946.

(2) That there was no evidence to substantiate the British plea that Albania herself laid the mines which caused the damage.

(3) That it is not known as to which State is responsible for laying the mines in question.

(4) That in view of the fact that the Albanian Government had kept a close watch of the North Corfu Channel after May, 1946 and that the minefield had been recently laid, it is improbable that the Albanian Government remained in ignorance about the mine-laying operations.

(5) That the laying of the mine field which caused the disaster on 22nd October, 1946 could not have been accomplished without the knowledge of the Albanian Government.

(6) That the elementary consideration of humanity, and the principle of the freedom of maritime communication imposed an obligation on Albania to notify, for the shipping in general, the existence of a minefield in its territorial waters and to give a warning to the approaching warships about the dangers to which the mine field exposed them.

(7) That the Albanian Government did not notify the existance of the minefield in its waters and did nothing to prevent the disaster.

(8) That in view of the above the Albanian Government was under International Law responsible for the explosions which occurred on 22nd October, 1946 and was liable to pay the damages to the British Government.

(9) That the geographical situation of the Corfu Channel as connecting two parts of the high seas and as a frontier between Albania and Greece made it an international highway through which passage could not be prohibited by a Coastal State in time of peace.

(10) That in accordance with international custom, States in time of peace have a right to send their warships through straits used for International Navigation between two parts of the high seas without previous sanction of the Coastal State provided the passage is innocent.

(11) That the British warships were justified in passing through the Channel without previous authorisation of the Albanian Government in as much as their passage was innocent.

(12) That mine sweeping operation carried on by the United Kingdom through its war vessels, cruisers in November 1946 in Albanian territorial waters against the clearly expressed wish of the Albanian Government constituted a violation of Albanian sovereignty.

As a result of the above findings the Court by eleven votes to five gave the judgment that the Albanian Government was responsible for the explosions which occurred on 22nd October 1946 and for damage and loss for human life that resulted therefrom. The Court by fourteen votes to two held that the United Kingdom did not violate Albanian Sovereignty by means of the passage of her warship through the Channel on 22nd October 1946. It unanimously held that the United Kingdom did violate Albanian Sovereignty in carrying out mine sweeping operations in November 1946 and that this declaration by the Court constituted in itself appropriate satisfaction.

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53. The Scuttled U-Boats Case

(1946) I LAW REPORTS OF TRIALS OF WAR CRIMINALS
55 WAR CRIMES COURT, HAMBURG

The German High Command in North-West Germany made a surrender to the Allies on 4th May 1945 of itself and the naval vessels under its control in that area. After this surrender and after the coming into force of the armistice

which had been signed, the Garman Naval Command ordered all the German U-Boats to be scuttled. Although this order was recalled, the instructor to the U-Boats, officers on the night of 6th May scuttled two U-Boats. This instructor was charged with war crime.

The accused took the defence that .he did not know the terms of the instrument of surrender, and that he was not apprised of the counter-manding order.

The Court held that scuttling of U-Boats after the signing of the instrument of surrender was a war crime and that the accused was guilty of that erime.

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54. The Ionion Ships.

ADMIRALTY PRIZE COURT

(1855) 2 SP. 212

The Treaty of Paris of 1815 provided that the Ionian Islands were to form a free and independent State and that this State was to be placed under the immediate and exclusive protection of King of Great Britain. Under the terms of this Treaty the Ionion States were, with the approbation of Great Britain to regulate their internal affairs and that Great Britain had the right of making peace or war on behalf of the Ionian States. During the Crimean War some ships flying the Ionian flag were captured in the Black Sea by British Cruisers and were brought in for adjudication. It was alleged that the Ionian Islands were British subjects and they were trading with the enemy.

It must be noted that Great Britain had not declared war against Russia on behalf of the Ionian Islands.

The question in this case was whether the Ionian Islanders were British subjects.

The Captors maintained that the Ionian vessels were to be considered as British subjeots and that as British vessels were prohibited from trading with Russia during war the Ionion vessels could not be permitted to carry on trade with the enemy. On the other hand, the Ionian Islander, the owner of the vessels contended that he was an Ionian subject and inasmuch as no war has been declared on behalf of the Ionian State he was at peace and the sea-borne trade he was carrying on was lawful.

The Court held :—

1. That the States and the subjects of the Ionian States

must he governed by the Treaty as far as the right or interest of the powers which were parties to the Treaty was concerned.

2. That although the military, naval and diplomatic power with respect to the Ionian State vested in, British Government, the Ionian State was a free and independent State and its subjects could not be regarded British subjects.

3. That Ionian State was not at war with Russia as there had been no such declaration.

4. That there was nothing whatsoever to show that the Ionian State was the ally of the British Government in war.

5. That the vessels not being property of British subjects could not be held to be engaged in any illegal trade with the enemy and they were to be restored.

The ships were thus released by the Court.

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55. Gerhart Eisler *v.* U. S. A.

U. S. COURT OF APPEAL

(Extradition

D. C. CICRUIT, D O C No. 9813.

In 1941 Eisler who was a leading German communist came to the United States with a certified transit certificate authorising him to apply for passage on his way to Mexico from a Vichy concentration camp. He was held at Ellis Island and was permitted to go by boat. This permission was revoked and he was not allowed to depart. In 1945 he filed an Alien Departure Permit Application which was rejected. In 1946 Eisler and his wife were allowed to go to the Soviet Union. Before Eisler could depart this permission was revoked and in 1947 he was convicted for perjury with respect to the statements made by him in Alien Departure Permit Application of 1945. Eisler filed an appeal and secured release on bail. While on bail, Eisler obtained passage on board the Polish ship Batory, which was sailing from the United States to Poland. At Southampton, Eisler was informed that extradition proceedings had been taken by the United States Government and he was asked to accompany the British police officers to answer the proceedings. Eisler, on his refusal to accompany the police officers, was forcibly removed from the ship. Poland protested against this action on the ground that the extradition proceedings were contrary to International Law. The British Government refused the prayer of Poland to hand over Eisler back. In the mean time the United States altered the charge and in place of the charge for perjury a charge for making false statements in 1945, application was substituted.

Eisler raised the plea that the United State's motive for demanding his extradition was political. The Magistrate held that the false statement made by Eisler in 1945 application did not. constitute an offence of perjury as understood in England and that Eisler was not convicted of an extraditable offence. Extradition was thus refused.

HOUSE OF LORDS

56. Sovfracht (v/o) V. Van Udens Scheep vaarten Agentruur Maatschappy (N. V. Geler).

1943 A. C. 203.

Facts.—The respondents who were a Dutch shipowning company at Rotterdam chartered one of their vessels to the appellant Russian Company in 1939. In accordance with the charter the dispute that arose between the two parties were referred to arbitrators in April 1940. Germany invaded and occupied Nether-lands in May 1940. The Royal Nether lands Government was transferred to London. The vessels belonging to the respondent company were taken elsewhere so as to be beyond the control of the enemy. There was however no evidence that their place of business which was Rotterdam was also changed.

After the German occupation of the Nether-lands the Custodian of the Enemy Property was asked to allow the arbitration to proceed on the understanding that the money realized as a result of the arbitration would be paid to the Custodian. This permission was granted, but the appellants refused to proceed with the arbitration on the ground that the respondents had become alien enemies and the retainer of their solicitors was terminated.

In June 1940 the respondents applied fort the appointment of an umpire. The Master made the order which was confirmed by a Judge in Chambers. The Court of Appeal dismissed the appeal. The Court of Appeal held that the respondents had not become alien enemies at Common Law, that they were enemies within the meaning of the Trading with the Enemies Act and the retainer of their solicitors was terminated, so that their solicitors could not legally act for the respondents. It was of the opinion that as respondents could

not be deemed to be enemies at Common Law they could proceed with the arbitration. The appellants went up in appeal to the House of Lords which allowed the appeal and reversed the judgment of the Court of Appeal.

Two main questions arose for determination :—

(1) Whether the respondents were alien enemies at Common Law and whether they had a right to resort to the King's Courts.

(2) Whether the retainers of the respondent's solicitor had terminated and whether the respondent's solicitor could validly act.

On the above questions it was held :—

Per Viscount Simon, J. C.—

(1) "There can be no doubt that the respondent company must be treated as 'resident' in Rotterdam. Their commercial domicile was there and there is no indication that it has changed."

(2) 'If the enemy power invades and forcibly occupies territory outside his own boundaries residence in that territory may disqualify from bringing or maintaining suit in the King's Courts in the like manner as residence in the enemy power's own territory would. The same applies to a company commercially domiciled or controlled in occupied territory."

(3) "If, as a result of the occupation, the enemy is provisionally in effective control of an area at the material time and is exercising some kind of government or administration over it, the area acquires 'enemy character"..............In the present case the occupation of Holland by Germany is plainly, as things stand, of more absolute kind."

(4) "This consideration equally applies to a claim sought to be established in our courts by a resident in enemy occupied territory, for if the claimant succeeds an asset in the form of an award or a judgment is created which the occupying power can appropriate and which is calculated to increase the enemy's resources."

(5) "The operation of the rule referring *perona standi in judicio* is always subject to permission given by royal licence. In the present case, no application for a royal licence has been made."

per Lord Wright :—

(1) "It is, I think, clear both on principle and on authority that a person resident or domiciled in an enemy-occupied country is in English land to be deemed to be an enemy, and, as such, subject to some disabilities as an enemy in the ordinary sense while the occupation continues."

(2) "The inhabitants of ememy-occupied countries, who before the subjugation were neutral or were enemies of the occupying belligerent, become enemies of those to whom they previously stood in a relation of allegiance or alliance so long as the occupation continues. This enemy character depends on objective facts, not on feelings, or sentiments or birth or nationality. They have been described as territorial or technical enemies. Their status is based on residence, or, if they are traders, on what has commercial domicile, which has the peculiarity that it may be attached to a trader who is not personally present in the occupied territory, but resides, for example, in a neutral country."

per Lord Poster :—

"The opinion expressed in...*Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Brita'n) Ltd.*, appear to accept the view that it would not be permissible for an alien enemy to appoint an agent after he had become such. Could, there, such an agent continue to act on behalf of one who was an alien friend when the appointment was made, but had subsequently been placed in a position which compelled him to be treated as an enemy ?......Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessiates such intercourse...........The prohibition of intercourse with an enemy is not confined to trade, and would, therefore apply to a solicitor, who at any rate in this country, is the mandatory of his principal for the purposes of litigations."

In this view of the matter the appeal was allowed,

57. Krajink v. The Tass Agency.

COURT OF APPEAL.

(1949) 2 All. E. R. 274

The plaintiff taking exception to an article in a newspaper published by the Tass Agency issued a writ against the Agency. The defdt., Tass Agency, made appearance and contended that it was a department of the Government of a foreign State and certificate from the foreign Ambassador mentioning that the Tass Agency was a department of the Government was filed.

The Master held that the Defdt. Agency was immune and set aside the writ. This judgment was affirmed in appeal also.

The Court of appeal held that the mere fact that the Tass Agency was a legal entity did not deprive it of the immunity which it enjoyed as being a Department of the Soviet Government. The Court observed that 'a sovereign government may so incorporate a particular Department of State as to make it plain that it is to be an ordinary trading, commercial, or business activity and not to be part of the State so that it can claim immunity and that it did not necessarily follow 'that, because a department of State was granted incorporation, it was deprived thereby of the right to assert its sovereign immunity in foreign Courts.'

58. The Peleus Trial

WAR CRIMES COURT, HAMBURG

(1954) Cameron, J. (Editor), The Peleus Trial, 1948.

The Peleus, a Greek vessel after leaving Freetown was sunk in the South Atlantic waters by a German U-boat without warning. The place, where it was sunk was within the range of Allied land based aircrafts. Thereafter the commander of the U-boat ordered his guns to open fire on the survivors of the ship Peleus, in the water. This firing killed 32 of the 35 crews of the ship.

The U-boat which sunk Peleus later on suffered an aerial attack and its crew was captured. The captain of the U-boat and its crew including its medical officer responsible for the firing were tried for war crimes.

The accused took the plea that they were not guilty as they acted in obedience to the orders of their superior officer.

The War Crimes Court held :—

1. that killing of unarmed enemies is not permitted and firing and killing of the helpless survivors of a torpadoed ship is a crime under International Law.

2. that although there was a duty to obey lawful orders of higher authority, there was no duty to obey unlawful orders of superior officers.

3. that the orders of the higher authority for firing and killing the helpless crew of Peleus were unlawful and the accused obeying them cannot plead justification.

All the accused were found guilty.

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59. The Kim

PROBATE DIVISION

(1915) P. 215

The Kim and three other Norwegian vessels which had been chartered to an American Corporation weres ailing from New York to Copenhagen. This American Corporation had a German as its Chairman. Its European agent was also a German. The Kim was laden with foodstuffs, rubber and hides while the other vessels were laden with foodstuffs and rubber. During their voyage they were captured in November 1914 and their goods were seized as contraband.

The question raised in the case was whether the vessels were carrying contraband goods.

This Court considered the law relating to continuous voyage or continuous transportation in relation to the ultimate hostile destination of conditional and absolute contraband.

The Court observed :—

"The doctrine of 'continuous voyaye' was first applied by the English Prize Courts to unlawful trading.

There is no reported case in our Courts where the doctrine is applied in terms to the carriage of contraband ; but it was so applied and extended by the United States Courts against this country in the time of the American Civil War ; and its application was acceded to by the British Government of the day and was moreover acted upon by the International Commission which sat under the Treaty made between this country and America at Washington on May 8, 1871, where the Commission......................unanimously disallowed the claims in the Peterhoff which was the leading case upon the subject of continuous transportation in relation to contraband goods.........

A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the Conference in the case of absolute contraband and it was expressly declared that, it is immaterial whether the carriage of the goods is direct, or entails transhipment, or a subsequent by transport lands.

As to conditional contraband the attempted compromise was that the doctrine was executed, in the case of conditional contraband, except where the enemy country had no seaboard.

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation both in relation to carriage by sea and to carriage over land, had become part of the Law of Nations at the commencement of the present war, in accordance with the principles of recognised legal decisions, and with the aid of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.'

The Court came to the conclusion :—

1. That 'the cargoes—other than the small portions acquired by persons in Scandinavia whose claims are allowed—were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that

country by sale or otherwise ; that 'Copenhagen was not the real *bona fide* place of delivery ; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination.'

2. That the cargoes were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination.

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60. The Island of Palmas Case.

PERMANENT COURT OF ARBITRATION.

(1928) No. XIX

In 1906 the United States claimed the Island of Palmas on the ground that it was a part of the Philippine Archipelago which had been ceded to it by Spain under the Treaty of 1898 which terminated the Spanish—American War. The Netherlands also laid claim to the island on the ground that it had been exercising undisputed authority over the island for a very long time.

In 1925 the claimants agreed to refer this controversy to the Permanent Court of Arbitration to be decided by a single arbitrator.

The Arbitrator made the following observations :—

1. "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise there to the exclusion of any other State, the functions of a State..........."

2. "Titles of acquisition of territorial sovereignty in present-day International Law are either based on an act of effective apprehending, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary power, or at least one of them, have the faculty of effecting disposing of the ceded territory. In the same way natural accretion can only be conceived of as accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its con-

tinuation. So true is this that practice.........recognises......... that the continuous and peaceful display of territorial sovereignty.........is as good as a title............"

The Arbitrator after examining the entire evidence in the case came to the conclusion that 'the Netherlands title of sovereignty acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700 therefore holds good.' The award was that the Island of Palmas or Miangus formed in its entirety a part of Netherlands Territory.

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61. The Essen Lynching Case.

WAR-CRIMES COURT, ESSEN.

(1952) I Law Reports of Trials of War Criminals, 88.

In 1940 three British airmen were captured by a German army. The captain of the German army sent these British airmen under an escort to the nearest Luftwaffe Unit for interrogation. The German captain had in voice directed the escort not to interfere in any way if the prisoners were molested on their way to Luftwaffe Unit. On their way the three British airmen were attacked by a mob and were thrown over a bridge with the result that they were all killed.

The German captain who had made the order was also a member of the escort. He and five civilians were charged with war crime on the ground that they had been concerned in the death of the three British airmen.

It was contended by the Prosecution that the German captain who had given an order to the escort was as much responsible for the death of the airmen as the other accused who gave physical blows. It was maintained that the order of the Captain was responsible for inciting the crowd to lynch these airmen and he was guilty.

As regards the members of the escort the Prosecution submitted that although they had been directed not to interfere if the crowd molested the airmen, they were under a duty to do something to prevent lynching. The Prosecution asserted that the members of the escort were the representatives of the power which had taken the airmen as prisoners

and had the duty not only to prevent the airmen from escaping but also of seeing that they were not molested and the member who was armed should have prevented molestation.

The result was that the Court after discussing the evidence found the captain and three civilians guilty.

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62. Juan Ysmael & Co. Incorporated v. Government of the Republic of Indonesia.

1954 All. E. R. (III) 236.

The Steamship Tasikmalaja belonging to Juan Ysmael & Co. (hereinafter called the Company) was chartered to the Government of Indonesia under a chartet party which was to expire on June 30, 1952. Before the expiry of the charter party negotiation for sale between the agents of the Company and the Government of Indonesia began and eventually the Steamship was sold under a bill of sale dated March 17, 1952. The purchasers, the Government of Indonesia, took measures to implement their title. The ship was brought to Hong Kong by the Government of Indonesia on March 13, 1952 for repairs. The Company on June 27, 1952 issued writ in *rem* against the ship claiming declaration of its legal possession of the ship. The Government of Indonesia entered appearance on June 30, 1952 and raised the objection that a foreign Sovereign State was the owner and in possession of the ship and all the proceedings were to be set aside as a foreign Sovereign State had been impleaded.

The question arising in the case related to the immunity claimed by the Sovereign State of Indonesia. *Earl Jowitt* laid down the rule that. "In their Lordships opinion, the view of *Scrutton L. J.* that a mere assertion of a claim by a foreign Government to property subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported on principle. In their Lordships' opinion, a foreign Government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign Government's claim. When the court reaches that point it must decline to decide the rights

(4) the principle of radioactivity of recognition validates acts of *de facto* Government but does not invalidate acts of previous *de jure* Government.

64. The Direct United States Cable Co. Ltd. *v.* The Anglo-American Telegraph Co. Ltd.

(1877) 2 A. C. 394.

The Direct United States Cable Co. Ltd (hereinafter called the Appellant Company) was incorporated in 1873 for establishing and working telegraph lines between Great Britain, the United States of America and Ireland. In 1874 the Appellant Company laid Sub-marine cable from Nova Scotia to Ireland through the coastal waters of New Foundland within the Conception Bay. The New York, New Found Land and London Telegraph Company was incorporated by an Act of the New Foundland legislature to construct, maintain and operate a line of telegraphs from any point in New Foundland to any other point. Another Company known as the Anglo-American Telegraph Co. was a joint stock company incorporated in England. Both these companies were amalgamated into one. The amalgamated company came to be styled as the Anglo-American Telegraph Co. (hereinafter called the Respondent Company).

The Respondent Company feeling aggrieved by the laying of the sub-marine cable from Nova Scotia to Ireland through the Conception Bay presented a bill for injunction against the Appellant Company. The injunction sought was to restrain the Appellant Company from laying, maintaining or constructing sub-marine cables within the jurisdiction of New Foundland. This injunction was granted and was confirmed by the Supreme Court of New Foundland. An appeal was preferred to the Privy Council.

Decision.—The Privy Council held that :—

(1) The legislature of New Foundland had clearly an intention of benefiting the Respondent Company and of prohibiting the use of any part of the territory of New Foundland by any other company.

(2) The harbours, estuaries and bays belong to the territory of the State, which is in possession of the shores round them. The Conception Bay belongs to the United Kingdom and the legislature of New Foundland was competent to enact laws with regard to the Bay.

The Privy Council dismissed the appeal.

65. Rahimtoola *v.* H. E. H. the Nizam of Hydrabad and others.

(1957) 3 All. E. R. 441.

Facts.—A sum of £ 1007,940 stood in 1948 at the credit of the Government of the Nizam of Hydrabad in a London Bank. In September 1948 when the Indian Government military forces had occupied the territory of Hydrabad the Nizam's Government transferred this amount to Rahimtoola who was posted in London as High Commissioner for Pakistan. The Bank accepted this assignment and placed this sum of money at the credit of Rahimtoola in its books. The Nizam raised an action for the recovery of money on the ground that he was entitled to the amount and was held in trust for him. The Government of Pakistan asserted its title to the money and claimed immunity from the jurisdiction of the English Courts. The Chancery Division upheld the plea of Pakistan, but the Court of Appeal repelled that contention. The House of Lords disagreed with the decision of the Court of Appeal.

Decision.—It was held by the House of Lords that as much as the amount stood in the name of Rahimtoola in his capacity as High Commissioner for the Sovereign State of Pakistan, the English Court could not exercise jurisdiction and the claim for sovereign immunity was well founded. It was observed that it was an inter-governmental transaction and deserved to be decided on diplomatic negotiations.

Lord Denning observed : "Sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly, but rather on the nature of the dispute...........if the dispute brings into question for instance, the legislative or international transactions of a foreign government, or the policy of the executive, the court should grant immunity, if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country ; but if the dispute concerns, for instance, the commercial transactions of a foreign government and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."